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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1031

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL
DAVID G. RALL and R. E. LEE
Petitioners

vs.

NORTHWEST AIRLINES, INC.
Respondent

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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vs.

NORTHWEST AIRLINES, INC.
Respondent

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

To the Honorable Warren E. Burger, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Air Line Pilots Association, International, David G. Rall and R. E. Lee pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on September 9, 1969.

OPINIONS BELOW

The Court of Appeals' opinion is reported in 415 F. 2d 493 and in 72 LRRM 2160. None of the District Court's opinions have been reported. The Court of Appeals'

opinion upon Northwest Airlines, Inc.'s earlier appeal in this case is reported at 373 F. 2d 136, 64 LRRM 2485 (8th Cir. 1967), and this Court's denial of Northwest Airlines, Inc.'s petition for certiorari is reported at 389 U. S. 827, 88 S.Ct. 77, 19 L. Ed. 2d 83, 66 LRRM 2307 (1967). All of the System Board of Adjustment and Court opinions in this case are printed in Appendix A hereto.

JURISDICTION

The Judgment of the Court of Appeals for the Eighth Circuit (A. 11) was made and entered on September 9, 1969. On November 29, 1969 Mr. Justice White signed an Order extending the time for filing this Petition for Certiorari to and including January 7, 1970. The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

QUESTION PRESENTED

May a district court award attorney's fees to petitioners successful in enforcing awards of an air line system board of adjustment established pursuant to the Railway Labor Act?

STATUTORY PROVISIONS INVOLVED

The statutes involved in this case, 28 U. S. C., §§ 1331 and 1337 and 45 U. S. C., §§ 151a, 153 First (p), 153 Second, 181, 182, 184 and 185, are set forth in Appendix B hereto.

STATEMENT OF CASE

This suit was brought to enforce air line system board of adjustment awards. The District Court's jurisdiction is sustained by 28 U. S. C., §§ 1331 and 1337 and by 45 U. S. C., §§ 153 and 184.

On February 10, 1965, Air Line Pilots Association, International ("ALPA") and two of its members, David

G. Rall and R. E. Lee, filed in the United States District Court for the District of Minnesota, a petition (IA. 8)[1] against Northwest Airlines, Inc. ("Northwest"), to enforce two January 8, 1965, Northwest Airlines Pilots' System Board of Adjustment awards (A. 12, 18) requiring the reinstatement of and payment of back pay to Rall and Lee, and for reasonable attorneys' fees. The System Board of Adjustment was established by Northwest and ALPA "in compliance with" 45 U. S. C., § 184. IA. 12. The Agreement establishing it provided:

> "Nothing herein shall be construed to limit, restrict, or abridge the rights or privileges accorded either to the employees or to the employer, or their duly accredited representatives, under the provisions of the Railway Labor Act, as amended • • •." IA. 15-16.

On August 6, 1965, the District Court, Hon. Gunnar H. Nordbye, J., entered its Order (A. 24) denying Petitioners' motion for summary judgment, holding that the Awards were subject to de novo review. The Court stated:

> "After these petitioners were notified of their discharge, hearings were held before management officials who sustained their discharge, and thereafter both Rall and Lee submitted the dispute to the local System Board of Adjustment pursuant to the provisions of the Railway Labor Act, 44 Stat. 577 (1926), 45 U S C, §§ 151 et seq., made applicable to air carriers, 49 Stat. 1189 (1936), 45 U S C, § 184. Thus, the provisions of 45 U S C, §§ 151, et seq., are relevant here. See **International Assn. of Machinists v. Central Airlines, Inc.**, 372 U. S. 682 (1963). • • •

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[1] References to "IA" are to volume I of the two-volume Appendix before the Court of Appeals in the certified record in this case; references simply to "A" are to Appendix A to this Petition.

"The issues presented by respondent's contention that it is entitled to a trial *de novo* arrive from the language employed in two sections of the Act. 45 U S C 153 First (m) provides for awards * * *. No provision is made in this section for the enforcement of the awards, but if the carrier does not comply with an award for an employee, he may petition for enforcement in this Court through 45 U S C, § 153 First (p)." A. 25-26.

On March 7, 1966, the District Court, Hon. Gunnar H. Nordbye, J., reversed itself and entered its order (A. 37) partially granting Petitioners' motion for summary judgment, holding that in light of **Gunther v. San Diego & A. E. Ry.**, 382 U. S. 257 (1965), the System Board of Adjustment awards must be deemed final and not subject to de novo review, and ruling that unless the record before the System Board of Adjustment showed that the awards were arbitrary and capricious, the Court would determine the amount of the money award to be allowed Rall and Lee in light of the awards' finality and such other evidence as may be relevant thereto. A. 44-45. The Court stated:

"In the instant proceeding, the System Board of Adjustment is recognized as a statutory board which came into existence under the Railway Labor Act, 45 U. S. C., § 151, et seq., as amended. There is no adequate showing to sustain respondent's position that there is any distinction as to the application of Section 153 of the Act as between the railways and the airlines. Respondent in this proceeding at all times relied upon the construction given by the courts to Sections 153 First (m) and 153 First (p) of the Act as the basis for its contention that it is entitled to a trial *de novo* with reference to the discipline that should be imposed upon these petition-

ers by reason of their violation of the rules of the company. Now that the Supreme Court has construed these sections in **Gunther**, it must necessarily follow that its construction thereof is binding upon this respondent." A. 42-43.

On July 20, 1966, the District Court, Hon. Gunnar H. Nordbye, J., ruled that the awards were not arbitrary or capricious, and accordingly granted Petitioners' motion for summary judgment. A. 46, 49. But the Court noted that Northwest had raised a claim that Rall and Lee were subject to termination or discharge for reasons arising subsequently to their discharge, A. 48, and accordingly ordered Northwest to reinstate them in accordance with the awards,

> "subject, however, to the right of the respondent to limit, discharge or terminate petitioners' employment based upon events occurring or conditions existing after their discharge by the respondent, and the Court reserves jurisdiction to determine whether the events occurring or conditions existing after the discharge of these petitioners affect their right of reinstatement or limit the amount of back pay due them under the System Board's orders, and reserves jurisdiction as to the question of attorneys' fees to be allowed petitioners as provided in Section 153 First (p) of the Railway Labor Act." A. 49.

On August 15, 1966, the Court of Appeals granted Northwest's application for leave to take interlocutory appeal. A. 51.

On February 23, 1967, the Court of Appeals affirmed the District Court's grant of partial summary judgment. 373 F. 2d 136, A. 52. The Court, Hon. Martin D. Van Oosterhout, C. J., ruled that federal court jurisdiction in the case was sustained by 45 U. S. C., § 153 First (p), saying:

"The issue of the court's jurisdiction was not raised in the trial court. By reply brief, NWA urges that § 153 First (p) contains the exclusive provision for jurisdiction * * *. The first sentence of such section is broad, reading:

> 'If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises.'

The quoted section appears to be broad enough to confer jurisdiction." 373 F. 2d at 141-42, A. 60-61.

On March 30, 1967, the Court of Appeals denied Northwest's petition for rehearing (A. 63), and on October 9, 1967, this Court denied Northwest's petition for certiorari, 389 U. S. 827 (A. 64).

After the denial of certiorari by this Court, the matter returned to the District Court for trial of the issues theretofore reserved by that court. The matter was tried without a jury from June 10 to June 26, 1968 (A. 65). On August 1, 1968, the District Court, Hon. Gunnar H. Nordbye, J., issued its order (A. 65) determining that Northwest had shown no events occurring or conditions existing after Rall's or Lee's discharge which would justify refusing to enforce the System Board of Adjustment Awards (A. 68-77), and concluding that "judgment may be entered in behalf of each of these petitioners as

to back pay * * * together with reasonable attorneys' fees to be determined later by the Court" (A. 79).

On October 11, 1968, the District Court, Hon. Gunnar H. Nordbye, J., entered its Order for Judgment, granting Rall and Lee reinstatement and back pay, awarding them attorneys' fees aggregating $71,500, and reserving jurisdiction to consider the allowance of further attorneys' fees and costs incurred by Petitioners in connection with the proceedings. A. 80-82.

Indicating that attorneys' fees were adequately proved, the Court stated in its Memorandum:

> "[I]f the Court is correct as to the application of Section 153 First (p), Title 45, U. S. C. A., to these proceedings, the interpretation to be given to the phrase 'a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit' must necessarily include the reasonable expenses that petitioners' attorneys incurred in the performance of such services.
>
> "* * * Admittedly, the legal services rendered by Lindquist and Vennum and their predecessors from February, 1965, to September 1, 1968, were devoted to involved and intricate questions of law and fact which required the highest legal skill." A. 85.

On September 9, 1969, the Court of Appeals, Hon. Martin D. Van Oosterhout, C. J., affirmed the District Court's Judgment except insofar as it provided for attorneys' fees, saying:

> "Petitioners contend that statutory authority for the allowance of attorneys' fees is found in 45 U. S. C. A., § 153 First (p). Provision is there made for attorneys' fees in connection with awards made by the Railroad Adjustment Board. Forty-five U. S. C. A., §§ 181 and 182, covering carriers by air, excludes § 153 as being applicable to air carriers. The attorney

fee issue was not before us on the prior appeal. The issue of the trial court's jurisdiction was not raised in the trial court on the judgment involved in the first appeal. The issue of lack of jurisdiction on the part of the court on the money award issue was first raised by NWA in its reply brief wherein it was contended that § 153 First (p) contains the exclusive provision for jurisdiction. The possibility that other basis of jurisdiction might exist was not argued by any party. We held that § 153 First (p) appeared to be broad enough to confer jurisdiction.

"We are of the view that we correctly determined on the prior appeal that jurisdiction existed but are now of the view that jurisdiction should have been based upon 28 U. S. C. A., §§ 1331 and 1337, not on 45 U. S. C. A., § 153. See **International Ass'n of Machinists v. Central Airlines, Inc.**, 372 U. S. 682, 685, 692, and 696; **Rosen v. Eastern Air Lines, Inc.**, 5 Cir., 400 F. 2d 462, 464.

"In any event, a finding of jurisdiction under § 153 would not solve petitioners' problem on the attorney fee issue. Forty-five U. S. C. A., § 184, creates authority on the part of contracting parties to confer on the System Board of Adjustment jurisdiction not exceeding that of a § 153 board, but it does not demand that jurisdiction be equal to that of a § 153 board. The parties by their contract creating the board made no provision for attorneys' fees, and we find nothing in the statutes which required them to do so.

"As pointed out by the Supreme Court in **Fleischmann [Distilling Corp. v. Maier Brewing Co.**, 386 U. S. 714 (1967)], absent contract or statutory authority, attorneys' fees may be allowed only in certain exceptional situations which are there pointed out. It is neither claimed nor established that this case falls within the **Fleischmann** exceptions.

"The judgment for attorneys' fees is reversed and the trial court is directed to vacate the judgment entered for attorneys' fees." 415 F. 2d at 498-99, A. 9-10.

REASONS FOR GRANTING THE WRIT

Introduction

The Court of Appeals' decision that attorneys' fees may not be awarded upon enforcement of air line system board of adjustment awards should be reviewed because it is upon an important question of federal law which should be settled by this Court, because it conflicts with directly applicable principles stated in all other relevant Court of Appeals (and District Court) decisions, because it conflicts with directly applicable principles stated by this Court in **International Ass'n of Machinists v. Central Airlines, Inc.**, 372 U. S. 682 (1963), and because, insofar as it holds that 45 U. S. C., § 153 First (p) does not confer jurisdiction to enforce airline board of adjustment awards, it directly conflicts with other Court of Appeals authority and raises an important question regarding the proper interpretation of **International Ass'n of Machinists v. Central Airlines, Inc.**, *supra*. If allowed to stand unreviewed, the decision below will necessarily throw all like proceedings involving this nation's gigantic airline industry and its hundreds of thousands of employees—many of which proceedings are being conducted at this very moment—into a state of confusion.

The Court of Appeals' decision in this case will necessarily pervade all proceedings like the present one to enforce airline board of adjustment awards. "Who must pay" is a serious and important element in any litigation. And in the present type of litigation, against a party with the economic power to "carry" the cost of lengthy litigation, "who must pay" may effectively control the question of whether litigation is initiated at all. Confusion as to

whether attorney's fees will be awarded should not be permitted to becloud the parties' ability to intelligently assess the prospects of litigation. The Court of Appeals' injection of confusion into this area of great public concern should not be allowed to endure.

The present case, in which it required over 4½ years and, among other things, two motions for summary judgment, a two week trial, opposition to two appeals, opposition to a petition for certiorari and expenditure of over $71,500 for Petitioners to obtain a judgment enforcing what were to be "final and binding" board of adjustment awards, illustrates well the importance of the question herein, and the need for its immediate resolution. **Cf. Gunther v. San Diego & A. E. Ry.**, 382 U. S. 257 (1965) (11 years). Until the question was raised in the trial court after Northwest's former appeal and this Court's denial of Northwest's petition for certiorari, all parties assumed attorneys' fees would be recoverable by Petitioners if they prevailed.[2] The Court can well appreciate the practical effect this assumption necessarily had upon the initiation and continuation of the present proceedings and would have upon any like proceedings.

Under the Railway Labor Act provisions applicable to rail and air carriers, the employer is accorded the unusual protection of freedom from employee strikes over "minor disputes" such as that involved in the present case. 45 U. S. C., §§ 153 First (i), 184. As a quid pro quo for this valuable protection, Congress intended the employees to have the benefit of the Act's grievance and enforcement machinery as an **effective** substitute for the

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[2] In its brief to the Court of Appeals upon its former appeal in this case, Northwest stated that in a suit to enforce a Northwest Airlines System Board award, "if [the employee] prevails he is entitled to recover attorneys' fees as well as costs. 45 U. S. C., § 153 First (p)." Appellant's Brief, p. 14, **Northwest Airlines, Inc. v. Air Line Pilots Ass'n Int'l**, 373 F. 2d 136 (8th Cir.), **cert. denied**, 389 U. S. 827 (1967).

strike as a remedy for minor disputes. See **Brotherhood of R. R. Trainmen v. Chicago R. & I. R. R.**, 353 U. S. 30, 41 (1957). With respect to rail carriers and their employees, it is undisputed that this machinery includes an award of attorneys' fees upon enforcement of board of adjustment awards. 45 U. S. C., § 153 First (p). If employees were not to be awarded attorneys' fees in cases like the present, employers would receive their protection against strikes without the employees receiving their quid pro quo. Consequently, employers could refuse with impunity to honor board of adjustment awards and employees, facing what might be (as in the present case) a huge outlay in order to resort to the courts, would be far less motivated to do so. This would thwart Congress' purpose of giving the employees a complete and effective remedy. Whether this remedy may be denied to this nation's hundreds of thousands of air carrier employees presents a vitally important question of federal law which needs to be settled by this Court.

I. The Recoverability of Attorneys' Fees Upon Enforcement of Air Line Board of Adjustment Awards Is an Important Question of Federal Law Which Should Be Settled by This Court.

Petitioners at all times have recognized the general rule relied upon by the Court of Appeals that attorneys' fees are not ordinarily recoverable absent a statutory or contractual provision therefor, and the fact relied upon by the Court of Appeals that 45 U. S. C., §§ 181 and 182 by their terms make 45 U. S. C., §§ 151, 152, and 154-163 applicable to air lines or their employees and that **those sections**, 45 U. S. C., §§ 181 and 182, do not expressly make any part of 45 U. S. C., § 153 applicable to air lines or their employees. But Petitioners have also consistently asserted that granting attorneys' fees upon enforcement of air line board of adjustment awards is nevertheless authorized

by the Railway Labor Act, 45 U. S. C., § 151 et seq. Whether this is so is an extremely important federal question which needs resolution by this Court, in the interests of this nation's gigantic air line industry, its hundreds of thousands of employees, and the millions of persons served by the industry and its employees.

The Northwest Airline Pilots' System Board of Adjustment was established by ALPA and Northwest "in compliance with" 45 U. S. C., § 184,[3] which requires every air carrier and its employees "to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title."

Under 45 U. S. C., § 153 Second, system, group, or regional board of adjustment awards are enforceable "in the same manner and subject to the same provisions" as National Railroad Adjustment Board ("NRAB") awards. In proceedings to enforce NRAB awards, "If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee." 45 U. S. C., § 153 First (p).

Petitioners have always felt that these provisions, read in the context of the Railway Labor Act as a whole and in the context of the Railway Labor Act's history, authorize the recovery of attorneys' fees herein. The provisions, thus read, clearly show the great substantiality and importance of the federal question here presented. As stated by this Court in **International Ass'n of Machinists v. Central Airlines, Inc.**, 372 U. S. 682, 686-87 (1963):

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[3] IA. 12. Nothing in the agreement precludes awarding attorneys' fees in suits to enforce System Board awards. The agreement states: "Nothing herein shall be construed to limit, restrict, or abridge the rights or privileges accorded either to the employees or to the employer, or their duly accredited representatives, under the provisions of the Railway Labor Act, as amended * * *." IA. 15-16.

> "The obligation which § 204 [45 U. S. C., § 184] fastened upon the carriers and their employees [to establish boards of adjustment] cannot be read in isolation. Its true significance must be drawn from its context as part of the Railway Labor Act which itself draws meaning from its history."

In 1926, Congress enacted the Railway Labor Act, 45 U. S. C., § 151 et seq.[4] In 45 U. S. C., § 151a,[5] it stated as purposes of the Act "to avoid any interruption to commerce or to the operation of any carrier engaged therein," and "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." To accomplish these purposes, the Act provided a new "board of adjustment" procedure as a substitute for the strike as a remedy for certain problems.[6]

Congress felt it proper to ensure the complete efficacy of the remedy it substituted for the strike by providing that in suits to enforce board awards, "If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee." 45 U. S. C., § 153 First (p).[7]

In 45 U. S. C., § 153, Congress not only established the NRAB (45 U. S. C., § 153 First),[8] it also provided that, instead of utilizing the **national** adjustment board, carriers

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[4] 44 Stat. 577 (1926). Relevant amendments to the Act were made in 1934, 1936, and 1966, as indicated in succeeding footnotes.

[5] Added 48 Stat. 1186-87 (1934).

[6] The 1926 Act provided for boards of adjustment to be created by agreement. 44 Stat. 578-79 (1926). The National Railroad Adjustment Board was created in 1934, as indicated below.

[7] Added 48 Stat. 1192 (1934).

[8] Added 48 Stat. 1189 (1934).

and their employees could, if they wished, mutually agree to the establishment of system, group, or regional boards of adjustment,[9] the awards of which were made enforceable "in the same manner and subject to the same provisions"[10] that apply to enforcement of NRAB awards. 45 U. S. C., § 153 Second.

In 1936, Congress determined to apply this type of procedure to air lines.[11] First it expressly made 45 U. S. C., §§ 151, 152 and 154-163 applicable to air lines and their employees. 45 U. S. C., §§ 181, 182. Then it provided, as it had as to railroads, for a national board, which would be called the National Air Transport Adjustment Board ("NATAB"), and the awards of which would be "made, stated, served, and enforced * * * all in the same manner and to the same extent as provided with reference to the National Railroad Adjustment Board by section 153 of this title." 45 U. S. C., § 185.

But instead of immediately establishing the national board, as it had the NRAB, Congress provided that the NATAB should be brought into existence "when, in the

[9] Added 48 Stat. 1193 (1934).

[10] Added 80 Stat. 208 (1966). This amendment is relevant to the present case where enforcement of the awards was had subsequently to the June 20, 1966 enactment of the amendment, notwithstanding that the petition was filed prior to the amendment. See **Brotherhood of R. R. Trainmen v. Denver & R. G. W. R. R.**, 370 F. 2d 833 (10th Cir. 1966), **cert. denied**, 386 U. S. 1018 (1967); **Transportation-Communication Employees Union v. Harriman & N. R. R.**, 270 F. Supp. 582 (E. D. Tenn. 1967); **cf. Denver & R. G. W. R. R. v. Brotherhood of R. R. Trainmen**, 387 U. S. 556 (1967). Further, the amendment merely clarifies a result indicated by the original act. See **Pigott v. Detroit, T. & I. R. R.**, 116 F. Supp. 949, 956-57 (E. D. Mich. 1953) **affirmed**, 221 F. 2d 736 (6th Cir.), **cert. denied**, 350 U. S. 833 (1955) (court's review of system board determination governed by 45 U. S. C. § 153 (m) (p)); **cf. Union R. R. v. National R. R. Adjustment Board**, 170 F. Supp. 281 (N. D. Ill. 1958).

[11] 45 U. S. C., §§ 181-188, 49 Stat. 1189 (1936). None of these provisions have been amended since their 1936 enactment.

judgment of the National Mediation Board, it shall be necessary." 45 U. S. C., § 185. Meanwhile, reliance would be upon system, group or regional boards of adjustment.

In 45 U. S. C., § 185, Congress expressly contemplated that after the establishment of the NATAB, some air line employees would prefer to continue utilizing their system, group or regional boards of adjustment. This shows most clearly that the procedures for enforcing NATAB awards (including the right to attorneys' fees) apply to system, group, or regional board awards, because if employees were unable to obtain attorneys' fees upon enforcement of such awards, it is crystal clear that none of them would stay with the system, group or regional board setup. **Compare Sigfred v. Pan American World Airways, Inc.**, 230 F. 2d 13, 17 (5th Cir.), **cert. denied**, 351 U. S. 925 (1956).

Further, "board of adjustment" is not a term of general meaning nor one known to the common law, like "arbitrator," "jury," or "referee." Rather, it is a word of art. The attributes of a "board of adjustment" are wholly unknowable without resort to the only place where such a board is described—45 U. S. C., § 153. And 45 U. S. C., § 153 Second describes such boards as handing down awards enforceable "in the same manner and subject to the same provisions" that apply to enforcement of NRAB awards. One of those "same provisions" is 45 U. S. C., § 153 First (p), which provides for attorneys' fees.

The Act taken as a whole clearly shows that the system, group, or regional board of adjustment setup required by 45 U. S. C., § 184 was to afford air lines and their employees **precisely** the same remedies as were provided railroads and their employees by 45 U. S. C., § 153. The legislative history of the air carrier amendments strongly reinforces this conclusion. The legislative history makes it clear (1) that under the Act in general and 45 U. S. C., § 184 in particular, airlines and their employees were to

be treated **identically** to railroads and their employees,[12] and (2) that the **only** difference perceived between the system, group or regional boards and the NATAB was that the former were to be temporary whereas NATAB was to be permanent.[13] Accordingly, it is obvious that the

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[12] Hearings on S. 2496 before a Subcommittee of the Senate Committee on Interstate Commerce, 74th Cong., 1st Sess. (1935) (U. S. Document No. Y4.In 8/3: R. 13/52), pages 4 ("it is only logical that it [air transportation] should also be provided with identical machinery for the settlement of its disputes"), 9 (Act would give "all the facilities that are now available to railway employees" and would put air line employees "exactly" "on a parity with railroad employees"; "our [air line] industry along with the railroads is entitled to a more complete and thorough means of working these things out, and I believe the Railway Labor Act is the thing"), 12 (45 U. S. C., §§ 183 and 184 "are drawn in such a way as to give exactly the same range to the men engaged in air transport as would be involved by men engaged in railroad employment" and to "make it apply with uniformity to both classes of employees") 15 (under 45 U. S. C., §§ 183 and 184 "airway operators will be able to invoke the benefits the same as railway employees may now do"), 23 ("The proposed amendments would simply enlarge the scope of the [Railway Labor] act to include another well-organized transportation agency") 24 ("anything which makes for stability in the labor relations and good morale of the railroad industry applies also to the flying industry") 27 ("In an industry such as air transportation * * * it is of special importance that every legal safeguard which long experience in labor relations has shown to be workable should be adopted by way of insurance against lowering of the morale of the service and break-down in labor relations"—"This purpose would definitely be accomplished for the air-transport industry by the Railway Labor Act").

[13] Statement of Edward G. Hamilton, representing the Air Line Pilots Association, *id.* at 3-4, 9, in which it was stated:

> "As we interpret the bill, it would apply to air transportation all of the provisions of the Railway Labor Act with the exception of section 3. **Section 3 is that provision of the act which establishes a National Railroad Adjustment Board.** It is the only provision in the act which is peculiarly adapted to the railroads. All of the other provisions are such that they may be applied to any industry without modification.
>
> "**In lieu of section 3** * * * it is * * * provided that a **special adjustment board or boards** may be established * * * **and** at any time that it may be warranted a **permanent na-**

decision below refusing to give air line employees the same protection as is accorded railway employees raises an extremely important and substantial question of federal law which needs to be settled by this Court.

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tional air transport adjustment board may be established with the **same powers and jurisdiction as the Railroad Adjustment Board.**

"* * * **The expense of maintaining a permanent adjustment board need not be undertaken until it has been shown that such expenditure is warranted. In the meantime a temporary board, or boards, may be established** * * *.

"* * * **[I]t is only logical that it** [air transportation] **should also be provided with identical machinery for the settlement of its disputes.**

* * * * * * * *

"Senator Minton. **You would have, then, under this act all the facilities that are now available to railway employees?**

"Mr. Hamilton. **That is right.**

"Senator Minton. In the matter of settling disputes?

"Mr. Hamilton. Yes, sir.

* * * * * * * *

"Senator Minton. **It would put you on a parity with railroad employees?**

"Mr. Hamilton. **Exactly.**" (Emphasis added.)

See **International Ass'n of Machinists v. Central Airlines, Inc.,** 372 U. S. 682, 689-90 (1963), wherein this Court stated:

"In view of the clearly stated purposes of the Act and of its history, reflecting as it does a steady congressional intent to move toward a reliable and **effective** system for the settlement of grievances, **we believe Congress intended no hiatus in the statutory scheme** when it postponed the establishment of a National Air Transport Adjustment Board and instead provided for compulsory system, group, or regional boards. Although the system boards were expected to be temporary arrangements, **we cannot believe that Congress intended an interim period of confusion and chaos** or meant to leave the establishment of the Boards to the whim of the parties. Instead, **it intended the statutory command to be legally enforceable in the courts** and the boards to be organized and operated **consistent with the purposes of the Act.**" (Emphasis added.)

II. The Court of Appeals' Refusal to Permit Recovery of 45 U. S. C., § 153 First (p) Attorneys' Fees Upon Enforcement of an Air Line Board of Adjustment Award Conflicts in Principle With Other Court of Appeals (and District Court) Decisions Holding That Proceedings Regarding Air Line Board of Adjustment Awards Are Governed by 45 U. S. C., § 153 Provisions.

The Court of Appeals' refusal to permit recovery of attorneys' fees conflicts in principle with the decisions of many other Courts of Appeal and District Courts holding that proceedings regarding air line board of adjustment awards are governed by provisions of 45 U. S. C., § 153. See **Transport Workers Union of America v. American Airlines, Inc.**, 413 F. 2d 746, 748 (10th Cir. 1969) (§ 153 First (m) (p) finality and enforceability in district courts); **Kelley v. Eastern Air Lines, Inc.**, 389 F. 2d 478 (5th Cir. 1967) (§ 153 First (m) (p) finality requirement) (by implication); **Capitol Airways, Inc. v. Air Line Pilots Ass'n Int'l**, 341 F. 2d 288 (6th Cir.), **cert. denied**, 381 U. S. 952 (1965) (§ 153 First (m) (p) finality requirement) (by implication); **Flight Engineers Int'l Ass'n v. American Airlines, Inc.**, 303 F. 2d 5, 10 (5th Cir. 1962) (§ 153 First (i) jurisdiction of board); **Arnold v. United Air Lines, Inc.**, 296 F. 2d 191, 195; (7th Cir. 1961) (§ 153 Second board members' eligibility); **Woolley v. Eastern Air Lines, Inc.**, 250 F. 2d 86, 90 (5th Cir. 1957), **cert. denied**, 356 U. S. 931 (1958) (§ 153 First (m) (p) finality) (by implication); **Crusen v. United Air Lines, Inc.**, 239 F. 2d 863 (10th Cir. 1956), **affirming per curiam on basis of opinion below** 141 F. Supp. 347 (D. Colo. 1956) (§ 153 jurisdiction of board; decisions regarding NRAB jurisdictional and procedural issues apply to cases involving air line system boards); **Sigfred v. Pan American World Airways, Inc.**, 230 F. 2d 13, 16-17 (5th Cir.), **cert. denied**, 351 U. S. 925 (1956) (§ 153 First (m) finality); **Edwards v. Capital Airlines, Inc.**, 176 F. 2d 755, 760

(D. C. Cir.), **cert. denied,** 338 U. S. 885 (1949) (§ 153 First (m) finality); **Thorgeirsson v. Trans World Airlines, Inc.,** 288 F. Supp. 71, 75-76 (S. D. N. Y. 1968) (§ 153 First (p) jurisdiction of district court, § 153 First (m) (p) finality requirement); **Dominguez v. National Airlines, Inc.,** 279 F. Supp. 392 (S. D. N. Y. 1968) (§ 153 First (p) finality requirement); **Gordon v. Eastern Air Lines, Inc.,** 268 F. Supp 210 (W. D. Va. 1967) (§ 153 First (r) statute of limitations; § 153 First (m) (p) finality); **Hyland v. United Air Lines,** 254 F. Supp 367 (N. D. Ill. 1966) (§ 153 First (m) (p) finality requirement) (by implication); **Bates v. Northwest Airlines, Inc.,** 171 F. Supp. 273 (D. Minn. 1959) (§ 153 First (p) jurisdiction of district court; § 153 First (o) (p) requirement of entry of board order; § 153 First (m) procedure for board interpretation of award; § 153 First (r) statute of limitations); **Farris v. Alaska Airlines, Inc.,** 113 F. Supp. 907 (W. D. Wash. 1953) (§ 153 First (m) (p) finality requirement); **International Union, UAW v. Delta Air Lines, Inc.,** 83 F. Supp. 63 (N. D. Ga. 1949) (§ 153 Second requisites of adjustment board).

Thus, the courts have properly stated that, "Under * * * 45 U. S. C. A. § 153 * * * the orders of * * * [an air line] System Board of Adjustment to which grievances have been submitted under a collective bargaining agreement are explicitly final and binding upon both parties to a dispute and are enforceable in district courts," **Transport Workers Union of America v. American Airlines, Inc.,** *supra,* 413 F. 2d at 748; have referred to "45 U. S. C. A. § 153, which by virtue of 45 U. S. C. A. §§ 184-185, is applicable to the award of an Air Carrier System Board of Adjustment," **Bates v. Northwest Airlines, Inc.,** *supra,* 171 F. Supp. at 274; have stated that, "the [air line] System Board is vested with jurisdiction equivalent to that exercised by 'system, group, or regional boards of adjustment, under the authority of section 153 of this

title,'" **Crusen v. United Air Lines, Inc.**, 141 F. Supp. 347, 349 (D. Colo.), **affirmed per curiam on basis of opinion below**, 239 F. 2d 863 (10th Cir. 1956); and have referred to the question of "the true constitution and function of the adjustment board provided by Section 153 of Title 45 U. S. C. A., which is by Section 184 made applicable to air carriers and their employees," **International Union, UAW v. Delta Air Lines, Inc.**, *supra*, 83 F. Supp. at 63.[14]

The reasoning in **Gordon v. Eastern Air Lines, Inc.**, *supra*, 268 F. Supp. 210, 212-13 (W. D. Va. 1967), in which the Court determined that the statute of limitations and finality provisions of 45 U. S. C., § 153 were applicable to proceedings regarding air line system board awards, is eminently sound and applies fully to the present case:

> **"If isolated and read superficially * * * 45 U. S. C. § 181 * * * would indicate that * * * 45 U. S. C. § 153 * * * should not be construed as having any effect on minor labor disputes, like this, which arise in the airlines industry. However, when § 181 is read in the light of the expressed and implied intent of the entire Railway Labor Act** (the intent to minimize interruption in the nation's rail and air transportation services caused by strikes and labor disputes) **and in the light of the Act's legislative history, the meaning of § 181 takes on a somewhat different perspective.** * * *
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> * * * * * * * *
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> "Plaintiff argues that by not including § 153 in the above-quoted enumeration of provisions in § 181, Congress intended that § 153 should not apply to the airline industry. Defendant contends that numerous decisions have held or assumed, because of the unity of purpose in the Railway Labor Act with respect to both the National Railway Adjustment Board and the Airlines System Boards of Adjustment that the

[14] Followed in **Farris v. Alaska Airlines, Inc.**, *supra*.

Airlines System Boards are the equivalent of the Railway Adjustment Board for all material purposes. * * *

"From an examination of the case authority cited by the parties, it appears that defendant's position, while not completely unassailable, is more persuasive. The 1966 amendment to the Railway Labor Act (P. L. 89-456, 80 Stat. 208), if anything, strengthens his position. * * * **Not only would the stated purpose of settling disputes in the airlines industry in a prompt and orderly manner be severely hampered by not applying most of the provisions of § 153 to these disputes, but refusal to make such an application would be a refusal to recognize why § 153 was not originally extended to airlines.** As I read the Railway Act and the judicial decisions construing it, this initial omission of § 153 in 1936 was **merely to postpone the establishment of a National Air Transport Adjustment Board while the airlines industry grew. It was not intended to provide an interim period of confusion and chaos.**" (Emphasis added.)

In fact, there are **no** relevant[15] cases other than the decision below holding any part of 45 U. S. C., § 153

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[15] The only exceptions, **Metcalf v. National Airlines, Inc.**, 271 F. 2d 817 (5th Cir. 1959), and **Air Line Pilots Ass'n, Int'l v. Trans World Airlines, Inc.**, 203 F. Supp. 438 (W. D. Mo. 1962), each holding that a federal district court lacks jurisdiction to enforce an air line board of adjustment award, are no longer relevant in light of this Court's explicit holding in **International Ass'n of Machinists v. Central Airlines, Inc.**, 372 U. S. 682 (1963), that federal district courts do possess such jurisdiction.

Rosen v. Eastern Air Lines, Inc., 400 F. 2d 462 (5th Cir. 1968), cited in the opinion below, is not to the contrary. In that case, **after holding that a system board award was final,** relying upon **Gunther v. San Diego & A. E. Ry.**, 382 U. S. 257 (1965), and other **railroad cases under 45 U. S. C., § 153,** the Court gratuitously added:

"With what we have said, it is not now necessary for us to consider the contention made by the appellee [claiming

inapplicable to proceedings to enforce air line board of adjustment awards.

Because the decision below stands alone in this regard, and because its holding is contrary to the principles underlying the many decisions of other Courts of Appeal as well as of District Courts holding that 45 U. S. C., § 153 provisions do apply to proceedings regarding air line board of adjustment awards, Petitioners respectfully submit that it is imperative that this Court review the decision.

III. The Court of Appeals' Refusal to Permit Recovery of 45 U. S. C., § 153 First (p) Attorneys' Fees Upon Enforcement of an Air Line Board of Adjustment Award Conflicts in Principle With This Court's Decision in International Ass'n of Machinists v. Central Air Lines, Inc., 372 U. S. 682 (1963), Holding That the 45 U. S. C., § 153 Requirement of Finality Applies to Air Line Board of Adjustment Awards.

Attorneys' fees are required in the present case for the same reasons that finality was held to be required in **International Ass'n of Machinists v. Central Airlines, Inc.**, 372 U. S. 682 (1963):

> **"The obligation which § 204 [45 U. S. C., § 184] fastened upon the carriers and their employees cannot be read in isolation. Its true significance must be**

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that the award was final] that appellants' complaint fails to state a cause of action under the 1966 amendments to '§ 3 First' of the Railway Labor Act, 45 U. S. C. A., § 153, except to say that it is novel since this section is not applicable to airlines. See 45 U. S. C. A., §§ 181, 182, 184 and International Ass'n of Machinists A. F. L.-C. I. O. v. Central Airlines, Inc., 372 U. S. 682, 685, 83 S. Ct. 956, 10 L. Ed. 2d 67 (1963)." 400 F. 2d at 464.

Considering the **Rosen** decision as a whole, this obiter dictum certainly does not render **Rosen** contrary to petitioners' position.

drawn from its context as part of the Railway Labor Act which itself draws meaning from its history. [Citations omitted.]

* * * * * * *

"In view of the clearly stated purposes of the Act and of its history, reflecting as it does a steady congressional intent to move toward a reliable and **effective** system for the settlement of grievances, **we believe Congress intended no hiatus in the statutory scheme when it postponed the establishment of a National Air Transport Adjustment Board and instead provided for compulsory system, group, or regional boards.** Although the system boards were expected to be temporary arrangements, **we cannot believe that Congress intended an interim period of confusion and chaos** or meant to leave the establishment of the Boards to the whim of the parties. **Instead, it intended the statutory command to be legally enforceable in the courts** and the boards to be organized and operated **consistent with the purposes of the Act.**

"* * * **'[T]he extent and nature of the legal consequences' of this duty** [under 45 U. S. C., § 184, to establish adjustment boards] 'though left by the statute to judicial determination, are nevertheless to be **derived from it and the federal policy which it has adopted.'** [Quoting from previous cases.]

* * * * * * *

"**More specifically, the provisions of a § 204 contract,** such as those governing the composition of the adjustment board, the procedures to be employed as to notice and hearing or for breaking deadlocks, or the finality to be accorded board awards, **are to be judged against the Act and its purposes and enforced or invalidated in a fashion consistent with the statutory scheme.** [Footnote citing numerous lower court cases.]

* * * [16] Adjustment board decisions were expressly made final and binding in the 1926 Act, the National Railroad Adjustment Board awards were made enforceable in the federal courts by the 1934 amendments, and the awards under voluntary arbitration agreements were likewise made expressly enforceable by the statute. **There is no reason to believe that in 1936 Congress discarded for an entire industry an element essential to a reliable system of settling disputes under existing contracts * * *.**" 372 U. S. at 686-87, 689-91, 694-95. (Emphasis added.)

Like finality, recoverability of attorneys' fees upon securing enforcement of awards is an element essential to the adjustment board mode of settling disputes. As stated by this Court in **Brotherhood of Locomotive Engineers v. Louisville & N. R. R.**, 373 U. S. 33, 41 (1963), the "total effect" of the 45 U. S. C., § 153 First (p) provi-

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[16] At this point, the Court stated, "There may be, for example, any number of provisions with regard to the finality of an award that would satisfy the requirements of § 204 but we are quite sure that **some** such provision is requisite to a § 204 contract and that the federal law would look with favor upon contractual provisions affording **some** degree of finality to system board awards." Respondent may seize upon this language as showing that it rests with the parties in their contracting to include or exclude provisions for attorneys' fees, but such reliance would be misplaced. It must be remembered that in 1963, when this Court decided **Machinists**, the question of the degree of finality to accorded **NRAB** awards had not yet been settled. The latter question was only settled in 1965, by this Court's decision in **Gunther v. San Diego & A. E. Ry.**, 382 U. S. 257 (1965), and further in 1966, by Congress' amendment of 45 U. S. C., §§ 153 (m) (p), 80 Stat. 208 (1966). Since **Gunther** and the 1966 amendments, the cases have been clear that the finality required by those authorities is required also in air line cases. See **Transport Workers Union of America v. American Airlines, Inc.**, 413 F. 2d 746, 748 (10th Cir. 1969); **Northwest Airlines, Inc. v. Air Line Pilots Ass'n, Int'l**, 373 F. 2d 136 (8th Cir.), **cert. denied**, 389 U. S. 827 (1967); **Dominguez v. National Airlines, Inc.**, 279 F. Supp. 392 (S. D. N. Y. 1968); **Gordon v. Eastern Air Lines, Inc.**, 268 F. Supp. 210 (W. D. Va. 1967).

sions as to the award's finality, as to the petitioner's being excused from the costs of suit, **and as to his right to attorney's fees if he prevails,** "is to **provide a carefully designed procedure** * * * which will achieve the reviewing function **without any significant expense to the employee or his union.**" (Emphasis added.) **Accord, Raabe v. Florida E. C. Ry.**, 259 F. Supp. 351, 356-57 (M. D. Fla. 1966). In **Dieringer v. Chicago, M., St. P. & P. R. R.**, 278 F. Supp. 211, 214 (E. D. Wis. 1968), the Court said:

> "'45 U. S. C., § 153, First (p), evidences a policy designed to serve two purposes: (1) assuring aggrieved employees, who may not be able to afford legal fees, adequate legal representation in asserting their grievances; and (2) assuring attorneys adequate compensation for their time and services."

These same policies are present to an identical extent in proceedings to enforce air line adjustment board awards as they are in proceedings to enforce railroad adjustment board awards.

Thus, holding that attorneys' fees are not recoverable, like holding that awards are not final, is to read 45 U. S. C., § 184, in isolation rather than in its context as part of the Railway Labor Act and the history thereof; it is to create a hiatus in the statutory scheme and an interim period of confusion and chaos inconsistent with the purposes of the Act; it is to fail to determine the extent and nature of the legal consequences of the 45 U. S. C., § 184 duty to establish adjustment boards from the Railway Labor Act and the federal policy which it has adopted; it is to fail to judge the contract required by 45 U. S. C., § 184 against the Railway Labor Act and its purposes; it is to fail to enforce that contract in a fashion consistent with the statutory scheme; and it is to hold that in 1936 Congress discarded for an entire industry an element essential to a reliable system of settling disputes.

Accordingly, the Court of Appeals decision should be reviewed because of its clear conflict with the principles underlying this Court's holding in **Machinists.**

IV. The Court of Appeals' Holding That 45 U. S. C., § 153 First (p) Does Not Confer Jurisdiction to Enforce an Air Line Board of Adjustment Award Conflicts With Other Court of Appeals Authority and Raises an Important Question Regarding the Proper Interpretation of International Ass'n of Machinists v. Central Airlines, Inc., 372 U. S. 682 (1963).

In its decision upon Northwest's former appeal in this case, the Court of Appeals held that the trial court's jurisdiction was sustained by 45 U. S. C., § 153 First (p).[17]

However, in its present opinion, the Court of Appeals said:

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[17] **Northwest Airlines, Inc. v. Air Line Pilots Ass'n Int'l,** 373 F. 2d 136, 141-42, A. 60-61 (8th Cir.), **cert denied,** 389 U. S. 827 (1967).

Various consequences appear to flow directly from recognition of 45 U. S. C., § 153 First (p) as an independent jurisdictional basis in suits to enforce air line board of adjustment awards:

(1) Suit may be commenced in the district wherein the petitioner resides, where the carrier has its principal operating office, or through which the carrier operates, rather than just where the claim arose or where the carrier is incorporated, licensed to do business, or doing business (28 U. S. C., § 1391 (b) (c)).

(2) The petitioner is not liable for costs in district court or at any subsequent proceedings unless they accrue upon his appeal.

(3) The board's order is conclusive on the parties, and may not be set aside except for failure to comply with Railway Labor Act requirements or to conform or confine itself to matters within its jurisdiction, or for fraud or corruption by a board member.

(4) If the petitioner finally prevails he is allowed a reasonable attorney's fee as part of the costs of the suit.

(Petitioners assert that the last two points obtain even if 45 U. S. C., § 153 First (p) is not an independent jurisdictional basis in suits to enforce air line board of adjustment awards.)

"We are of the view that we correctly determined on the prior appeal that jurisdiction existed but are now of the view that jurisdiction should have been based upon 28 U. S. C. A., §§ 1331 and 1337, not on 45 U. S. C. A., § 153." 415 F. 2d at 498, A. 9.[18]

This decision directly conflicts with that of the Court of Appeals for the Tenth Circuit in **Transport Workers Union of America v. American Airlines, Inc.**, 413 F. 2d 746, 748 (10th Cir. 1969), where the Court said:

"In 1936, Congress applied the Railway Labor Act to the air transportation industry. 49 Stat. 1189, 45 U. S. C. A. §§ 181-188. But instead of extending the jurisdiction of the National Railroad Adjustment Board, 45 U. S. C. A. § 153, to include airline disputes, Congress provided for separate boards of adjustment. Until a national board for the airlines industry was established, Congress required the parties to collective bargaining agreements in that industry to form and to utilize system, group or regional boards of adjustment for the purpose of adjusting and deciding disputes between them. 45 U. S. C. §§ 184, 185. **See** International Ass'n of Machinists v. Central Airlines, 372 U. S. 682, 83 S. Ct. 956, 10 L. Ed. 2d 67 (1963). Such procedure as thus encouraged and structured became the subject of bargaining for future contracts. **Under the Act** as amended in 1966, 80 Stat. 208-209, 45 U. S. C. A. § 153 (Supp. 1969), **the orders of a System Board of Adjustment** to which grievances have been submitted under a collec-

[18] The Court cited, "See **International Ass'n of Machinists v. Central Airlines, Inc.**, 372 U.S. 682, 685, 692, and 696; **Rosen v. Eastern Air Lines, Inc.**, 5 Cir., 400 F. 2d 462, 464."

There is nothing in **Rosen** indicating under what statutes the District Court's jurisdiction was sustained. See note 15, *supra*. In **Machinists**, this Court did not hold that jurisdiction could not be sustained under 45 U. S. C., § 153 (p); rather, it held it could be sustained under 28 U. S. C., §§ 1331 or 1337.

tive bargaining agreement are explicitly final and binding upon both parties to a dispute and **are enforceable in district courts.**" (Emphasis added.)[19]

This raises an important question regarding the proper interpretation to be given to this Court's decision in **International Ass'n of Machinists v. Central Airlines, Inc.**, 372 U. S. 682 (1963). The Eighth Circuit and Tenth Circuit Courts of Appeal disagree as to whether **Machinists** rules out 45 U. S. C., § 153 (p) as a permissible jurisdictional basis for suits to enforce air line board of adjustment awards.[20]

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[19] **Accord, Thorgeirsson v. Trans World Airlines, Inc.**, 288 F. Supp. 71, 72-73 (S. D. N. Y. 1968) ("The present proceeding is brought by petitioners, pursuant to §§ 3 First (m) (p), 201, and 204 of the Railway Labor Act, 45 U. S. C. §§ 153 First (m) (p), 181 and 184"; **Bates v. Northwest Airlines, Inc.**, 171 F. Supp. 273, 274 (D. Minn. 1959) ("Jurisdiction of this Court over this action can only be predicated upon 45 U. S. C. A. § 153 which, by virtue of 45 U. S. C. A. §§ 184-185, is applicable to the award of an Air Carrier System Board of Adjustment such as the one rendering the award herein"; "Absent the application of said § 153, this Court would have no jurisdiction in the present case since diversity of citizenship is lacking and the claims of the individual plaintiffs do not exceed the jurisdictional amount").

[20] Petitioners assert that the Court of Appeals erred in reading **Machinists** as holding 28 U. S. C., §§ 1331 and 1337 to be **exclusive** jurisdictional bases rather than permissible jurisdictional bases. In **Machinists**, this Court held that jurisdiction to enforce air line board of adjustment awards existed under 28 U. S. C., §§ 1331 or 1337, regarding actions arising "under the * * * laws * * * of the United States" and "under any Act of Congress regulating commerce." These were the only bases of jurisdiction asserted by the **Machinists** petitioners, and they clearly would also sustain a suit to enforce an **NRAB** award. 28 U. S. C., §§ 1331 and 1337 on their face raise the question under **what** federal law does the action arise. This Court held in **Machinists** that the case arose under 45 U. S. C., § 184. The present action also arose under that section. Petitioners feel that because of the interrelationship of 45 U. S. C., § 184 with 45 U. S. C., § 153 (p) and the rest of the Railway Labor Act, jurisdiction to hear proceedings to enforce an award of a board created in compliance with 45 U. S. C., § 184 is properly sustained by 45 U. S. C., § 153 (p) as well as by 28 U. S. C., §§ 1331 and 1337.

If 45 U. S. C., § 153 (p) is a proper basis for the Court's jurisdiction to hear the case, it logically follows that the portion of 45 U. S. C., § 153 (p) regarding attorneys' fees also applies.

But the question what sections of the United States Code sustain the court's jurisdiction to hear the case is separate from that regarding what relief is to be given once the court assumes such jurisdiction, and Petitioners submit that regardless of what provisions sustain the district court's jurisdiction to hear the case, the relief it confers may include attorneys' fees.

Congress wanted air line adjustment board awards to be enforceable in federal court, and this Court held in **Machinists** that they were enforceable there. Petitioners assert that it is clear from the Railway Labor Act as a whole and from its legislative history that Congress wanted such enforcement to be subject to the same provisions as govern enforcement of NRAB awards, including the provision for attorneys' fees.

The provisions and the history of the Railway Labor Act prove there can be no doubt of Congress' purpose to encourage the enforcement of such awards. It is unthinkable that Congress intended such enforcement to be discouraged by the prospect of heavy legal expense, such as can be occasioned when an employer stubbornly refuses to obey an award.

The Act is patently remedial in nature. It must be construed liberally, in the manner which best promotes its evident purposes. So construed, it authorizes the granting of attorneys' fees in cases like the present one. The Court of Appeals' holding to the contrary, being upon an important question of federal law which should be settled by this Court, conflicting in principle with decisions of other Courts of Appeal and District Courts and of this Court, and, insofar as it holds that 45 U. S. C., § 153 (p) does not

confer jurisdiction to enforce air line board of adjustment awards, directly conflicting with other Court of Appeals authority and raising an important question regarding the proper interpretation of **International Ass'n of Machinists v. Central Airlines, Inc.**, 372 U. S. 682 (1963), should be reviewed by this Court.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX.

APPENDIX A.

(OPINIONS.)

[September 9, 1969 Court of Appeals Opinion (415 F. 2d 493).]

United States Court of Appeals
for the Eighth Circuit.

No. 19,541.

Air Line Pilots Association, International, David G. Rall and R. E. Lee,

Appellees,

v.

Northwest Airlines, Inc.,

Appellant.

} Appeal from the United States District Court for the District of Minnesota.

[September 9, 1969.]

Before Van Oosterhout, Chief Judge; Mehaffy and Lay, Circuit Judges.

Van Oosterhout, Chief Judge.

This is an appeal by defendant Northwest Airlines, Inc., (NWA), from an October 11, 1968 judgment enforcing awards of the Northwest Airlines Pilots' System Board of

Adjustment and awarding judgments to David G. Rall for $103,839.98 and to R. E. Lee for $128,821.68 as back pay as of August 21, 1968, with interest at 6% per annum from such date, and for costs and attorneys' fees and reinstating R. E. Lee in his employment with NWA.

This litigation arises out of the permanent discharge of Captain David G. Rall and copilot R. E. Lee for violation of company rules on a January 1, 1964, NWA flight. Captain Rall was discharged for violation of the rule prohibiting a pilot from using intoxicants within twenty-four hours of the commencement of a flight. Lee was discharged for acting as chief pilot on a flight with Rall, knowing Rall to be intoxicated.

NWA and the Air Line Pilots Association had entered into an agreement in compliance with 45 U. S. C. A., § 184, creating a Northwest Airlines Pilots' System Board of Adjustment to decide minor disputes arising under the terms of a working agreement between them.

In *Northwest Airlines, Inc. v. Air Line Pilots Ass'n, Int'l,* 8 Cir., 373 F. 2d 136, cert. denied 389 U. S. 827, we affirmed the determination by the District Court that the award of the adjustment board determining Lee was entitled to be reinstated with back pay from May 1, 1964, and that Rall was entitled to be reinstated with back pay from November 1, 1964. We also upheld the trial court's determination that the adjustment board's award was not arbitrary and capricious and that the award was final and not subject to de novo review by the courts. The District Court's order which we affirmed provided that the awards were:

> "subject, however, to the right of the respondent to limit, discharge or terminate petitioner's employment based upon events occurring or conditions existing after their discharge by the respondent, and the Court reserves jurisdiction to determine whether the

events occurring or conditions existing after the discharge of these petitioners affect their right of reinstatement or limit the amount of back pay due them under the System Board's orders, and reserves jurisdiction as to the question of attorneys' fees to be allowed petitioners as provided in Section 153 First (p) of the Railway Labor Act."

This case commences where the litigation considered on the prior appeal terminated. NWA has asserted and offered evidence directed to the issue that Rall and Lee by reason of events and conduct occurring subsequent to their discharge were not qualified to be re-employed as pilots for NWA. It is not contended that either petitioner suffered any physical deficiency which incapacitates him from flying NWA airplanes. It is conceded that both Rall and Lee had maintained their required pilots' licenses. NWA's contention is:

"* * * both of the petitioners have been and are suffering from deficiencies more subtle in character, more difficult to detect, more problematical to find, and more difficult to prove, than something as obvious as a heart condition. But nevertheless, it is Northwest's contention that both of the petitioners are suffering from some measure of character deficiency which incapacitates both of them from performing services and from receiving back pay for not performing services, which deficiencies in character are as real as if each and both of them were suffering from some form of a physically crippling ailment."

This case was tried to Judge Nordbye without a jury. The court in its unreported opinion discusses the evidence relied upon by NWA and finds the evidence insufficient to establish any character, mental, intellectual or emotional deficiency arising subsequent to the discharge which would incapacitate either Rall or Lee from flying NWA

airplanes. We have carefully examined the record and find that substantial evidentiary support exists for the trial court's findings with respect to the entitlement of both Rall and Lee to reinstatement and back pay. NWA has failed to establish such findings are clearly erroneous.

Captain Rall attained his sixtieth birthday on April 24, 1967, which is his retirement date and the date upon which his pension rights accrue. His back pay was computed to April 24, 1967, and no claim is made that he is entitled to restoration to active service. No error is claimed in the computation of Rall's back pay apart from the claim that he was not entitled to reinstatement as of the date fixed by the adjustment board.

The situation with respect to Lee is somewhat different. Lee has not reached his retirement age and is by the award and the decision of the trial court entitled to reinstatement in his employment. This does not mean, however, that NWA cannot require him to take additional necessary training before resuming flying or that it cannot subject him to further tests to determine his qualification for flight duty on planes currently operated by the company. NWA asserts it is in any event entitled to a new trial by reason of errors in excluding evidence and certain procedural errors.

Defendant offered the record made before the adjustment board and the flight clearance forms for the January 1, 1964, flight. Such exhibits were rejected. The trial court has a large discretion in ruling upon the admissibility of evidence and we doubt whether any error was committed in excluding the tendered exhibits. It is true, as defendant contends, that the board found Lee and Rall guilty of the rule violations charged. The board modified the penalty of permanent discharge imposed by NWA to a discharge for the period heretofore set out. Upon NWA's prior appeal we held that the adjustment board's

determinations in this respect were final and not reviewable.

The burden is upon the appellant to show that the asserted error in the admission or exclusion of evidence is prejudicial. No such showing is here made. Judge Nordbye had also presided in the prior trial and had in that case given detailed consideration to the adjustment board's records as a basis for determining that the adjustment board's findings were not arbitrary or capricious. The trial court states:

> "However, the Court in prior hearings has heard and considered the testimony before the System Board with regard to the January 1, 1964, violations, and if it be urged that that testimony should be considered in weighing the alleged magnitude and gravity of the present charges of moral and character insufficiency, the Court finds that after giving full and complete consideration to the testimony of the January 1, 1964, incident in connection with the present record, these two petitioners are entitled to the relief which they seek herein."

Such statement is in effect a statement that a consideration of the excluded evidence would have no affect upon the result. We are satisfied that no prejudicial error was committed in excluding the tendered exhibits.

NWA further urges error was committed in excluding the personnel records of Lee. We have examined the voluminous personnel file tendered. Lee's employment commenced on July 17, 1948, and except for minor interruptions and minor disciplinary action was continuous up to the discharge resulting from the January 1, 1964, incident. NWA's expert witness, Dr. Phillips, who had examined the personnel records and the adjustment board records, stated that he had not received therefrom suffi-

cient information to make a professional comment with respect to Lee's qualification as a pilot. At least evidence with respect to most of the information unfavorable to Lee in his personnel file was developed by testimony at the present trial. We are of the view that NWA has failed to demonstrate any prejudicial error was committed in rejecting the personnel file exhibit.

We find no reversible error in the trial court's refusal to order Lee to report to Pensacola, Florida, for an examination by Dr. Phillips. Lee had a current first class FAA physical certificate. We need not resolve the doubtful issue of whether good cause has been shown for the requested examination. See *Schlagenhauf v. Holder,* 379 U. S. 104. The application requested that Lee report to Dr. Phillips for examination at Pensacola, Florida, a point far distant from Lee's home and the seat of the trial. The trial court in its ruling states:

> "Well, gentlemen, in any event, I see no reason to require Mr. Lee to go to Pensacola, Florida, to be examined by Dr. Phillips. In the event at the hearing it should appear that there is any necessity for another mental or physical examination of Mr. Lee in addition to the showing that he makes by reason of the examination taken last March, the Court then will give such consideration to the request of another physical and mental examination as the situation may require. With that understanding, I will deny the motion."

Dr. Phillips and Lee were both present at the trial. The request for examination was not renewed. No abuse of discretion on the part of the trial court in making the ruling hereinabove quoted is shown.

NWA complains that the court erred in failing to compel Lee and Rall to answer certain questions propounded

to them in depositions which were objected to by their counsel and which they refused to answer. The proceedings and the questions are set out in the printed record which we have examined. For the most part, they relate to events on January 1, 1964, which resulted in the discharge. In the discussion between counsel and the court, the court inquired whether the questions related to happenings on January 1, 1964, to which NWA's counsel responded, "Not entirely." When asked what other phase was covered, counsel referred only to a question directed to Lee inquiring whether Lee if confronted with the same situation (drunken pilot) would have acted as he did on January 1, 1964. Such question was not asked at the trial. The trial court expressed the view that the January 1 evidence was irrelevant but made no final ruling, indicating the question would be considered later.

NWA in its brief has not demonstrated that any prejudicial error was committed by the failure of the court to rule on its application to require answers to the interrogatories. Under our rules, it is NWA's duty to point out specifically in its brief the error committed and the prejudicial nature thereof, and it is not the duty of the court to search the record for error. In any event, we have examined the record on the interrogatories and find no prejudicial error has been committed.

NWA next contends that the amount of the award of damages to Lee is excessive and is not supported by substantial evidence. Lee at the time of his discharge had qualified for a rating of captain of a DC-6. The award is based upon the testimony of Cizek who assumed for the purpose of his calculations, (1) that Lee moved from Honolulu to Minneapolis and became qualified as a DC-7 captain; (2) that he then bid for and took sufficient training to qualify as captain of a 727 jet; (3) that he accomplished the move to captain of a 727 on January 1, 1966,

and bid for and flew a regular schedule as such captain; (4) that by June 1, 1967, he bid for and became qualified as a captain of a 320 jet and bid for and obtained a regular flight on such aircraft out of Seattle on an international flight.

These assumptions are to a considerable extent based on the assumption that Lee would have taken the required training and made the progress made by one Hempel who was next below him on the seniority list.

It is not disputed that if the assumptions made are warranted, the mathematical computations upon which the award to Lee is based are valid. If we were the trier of fact, it is possible that we would have not made all the assumptions made by the trial court. The evidence is in controversy as to Lee's ability to make the rapid progress required to obtain the award made. However, fact findings and proper inferences to be drawn therefrom made by the trial court upon the basis of substantial evidence must be upheld unless clearly erroneous.

While we recognize that NWA believed it was acting in good faith in its attempt to enforce its penalty for pilot intoxication on duty, its continued refusal to comply with the adjustment board award, which has been upheld, must be considered a wrongful act upon its part. NWA by its action deprived Lee of the opportunity to exhibit by his performance that he was entitled to the rating and compensation claimed.

Here the fact of damage has been established. More leeway is allowable to a fact finder on the issue of the amount of damage, at least in situations where precise proof of the amount of damages is difficult if not impossible. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U. S. 251, 264; *Smith v. American Guild of Variety Artists*, 8 Cir., 349 F. 2d 975, 984, *McCleneghan v. Union Stock Yards of Omaha*, 8 Cir., 349 F. 2d 53, 56.

Lastly, NWA contends that the court erred in allowing the petitioners' attorneys' fees. It is a well-established rule that attorneys' fees are not ordinarily recoverable by a successful litigant in the absence of provision therefor in a statute or enforceable contract. *Fleischmann Distilling Corp. v. Maier Brewing Co.,* 386 U. S. 714; *Sprague v. Ticonic Bank,* 307 U. S. 161, 167; *Missouri Pacific R. R. Co. v. Slayton,* 8 Cir., 407 F. 2d 1078, 1082.

Petitioners have pointed to no contractual provision for attorneys' fees and we are unable to find any such provision.

Petitioners contend that statutory authority for the allowance of attorneys' fees is found in 45 U. S. C. A., § 153 First (p). Provision is there made for attorneys' fees in connection with awards made by the Railroad Adjustment Board. Forty-five U. S. C. A., §§ 181 and 182, covering carriers by air, excludes § 153 as being applicable to air carriers. The attorney fee issue was not before us on the prior appeal. The issue of the trial court's jurisdiction was not raised in the trial court on the judgment involved in the first appeal. The issue of lack of jurisdiction on the part of the court on the money award issue was first raised by NWA in its reply brief wherein it was contended that § 153 First (p) contains the exclusive provision for jurisdiction. The possibility that other basis of jurisdiction might exist was not argued by any party. We held that § 153 First (p) appeared to be broad enough to confer jurisdiction.

We are of the view that we correctly determined on the prior appeal that jurisdiction existed but are now of the view that jurisdiction should have been based upon 28 U. S. C. A., §§ 1331 and 1337, not on 45 U. S. C. A., § 153. See *International Ass'n of Machinists v. Central Airlines, Inc.,* 372 U. S. 682, 685, 692, and 696; *Rosen v. Eastern Air Lines, Inc.,* 5 Cir., 400 F. 2d 462, 464.

In any event, a finding of jurisdiction under § 153 would not solve petitioners' problem on the attorney fee issue. Forty-five U. S. C. A., § 184 creates authority on the part of contracting parties to confer on the System Board of Adjustment jurisdiction not exceeding that of a § 153 board, but it does not demand that jurisdiction be equal to that of a § 153 board. The parties by their contract creating the board made no provision for attorneys' fees, and we find nothing in the statutes which required them to do so.

As pointed out by the Supreme Court in *Fleischmann,* absent contract or statutory authority, attorneys' fees may be allowed only in certain exceptional situations which are there pointed out. It is neither claimed nor established that this case falls within the *Fleischmann* exceptions.

The judgment for attorneys' fees is reversed and the trial court is directed to vacate the judgment entered for attorneys' fees.

In all other respects, the judgment appealed from is affirmed.

A true copy.

Attest:
Clerk, U. S. Court of Appeals, Eighth Circuit.

[September 9, 1969 Court of Appeals Judgment.]

United States Court of Appeals for the Eighth Circuit.

No. 19541. September Term, 1969.

Air Line Pilots Association, International, David G. Rall and R. E. Lee,
Appellees,
vs.
Northwest Airlines, Inc.,
Appellant.

Appeal from the United District Court for the District of Minnesota.

This Cause came on to be heard on the record from the United States District Court for the District of Minnesota and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court as to awarding of attorneys' fees in this cause be, and is hereby, reversed and the cause remanded to the said District Court with directions to vacate the judgment entered for attorneys' fees.

In all other respects, the judgment of the said District Court appealed from be, and is hereby, affirmed.

September 9, 1969.

[Schedule of Costs—Omitted.]

[January 8, 1965 System Board of Adjustment Award—Rall.]

In the Matter of Arbitration
Between
Northwest Air Lines, Incorporated
and
Air Line Pilots Association, Intnl.
In Re: Captain David G. Rall.

ALPA
Case No. 5562.

AWARD.

This matter comes on to be heard before a five man board of adjustment on Tuesday, October 20, 1964, and that the case was not completed until mid-morning of October 23. Said hearings were held at the Conference Room located in the Executive Offices of the Northwest Airlines, Minneapolis-St. Paul, Minnesota.

The members of the System Board of Adjustment are:

Walter L. Gray, Referee
Leslie C. McQuain, Air Line Pilots Association
George A. Stone, Air Line Pilots Association
A. E. Floan, Northwest Airlines, Inc.
Ronald E. Stelzig, Northwest Airlines, Inc.

James A. Abbott apppeared as counsel representing Northwest Airlines, Inc. John G. Loomos and Harry F. Noe of the Legal Department of the Air Line Pilots Association appeared as counsel representing David G. Rall.

Company's Statement of Facts.

I. The evidence as introduced at the hearing disclosed that Captain David G. Rall was a captain on a MATS charter flight designated as Flight NO27 of January 1, 1964, which flew from Hickam Air Force Base in Honolulu, Hawaii, to Eniwetok with stops at Johnston Island and Kwajalein Island.

II. The charges as filed by the company against Captain Rall are as follows: "You served as a crew member on Flight NO27 on January 1, 1964, having used alcoholic beverages during the twenty-four period immediately preceding the departure of Flight NO27 of January 1, 1964, and you served as a crew member on Flight NO27 of January 1, 1964, during a period of known physical deficiency and responsibility with respect to the safety of the flight."

III. The evidence disclosed that Captain David G. Rall is 57 years of age and that he has worked as a pilot since 1928. That he was first employed by Northwest Airlines on September 15, 1942, and was later promoted to the status of Captain on April 3, 1943, and remained in the employ of the Northwest Airlines until he was notified on February 28, 1964, that he had been discharged and that his discharge was effective as of February 10, 1964. (Volume VI, Page 109, Line 22.)

Grievant's Statement of Facts:

I. It was the contention of Captain Rall that he had been assigned on a temporary basis to Hawaii for the month of December, 1963. See Volume VI, Page 158, Lines 7 and 8. He further contended that when he came back to Honolulu at 1:00 a. m. on the morning of December 31, 1963, and was released from duty, that he was under the definite impression that he had completed his assignment and testified that he had planned on going back to his home in Seattle, Washington, in the late afternoon or evening of December 31, if space was available.

II. The evidence shows and it was admitted by Captain Rall that he had two or three drinks of intoxicating liquor between the time that he arrived on his flight

at 1:00 a. m. on December 31, and 5:30 on the afternoon of the same day when he was suddenly notified that he had been assigned to take out a flight the following morning at 7:00 a. m. on January 1, 1964.

III. The evidence on behalf of Captain Rall further shows that from the time he was notified at 5:30 p. m. on the afternoon of December 31, 1963, to take a flight he had never anticipated and was not duty bound to make, that he did not consume any liquor after he was notified. This was a period of some 14 hours before the flight on January 1, 1964, at 7:00 a. m.

IV. It was further contended that Captain Rall's record was good to very good and they pointed out that this was admitted by at least two or three Company witnesses. The defense contends that the Company witnesses in so testifying negates the reason for discharge and that the punishment was too severe.

OPINION.

The Board in this ruling in no way seeks to set aside any public safety rule, where this rule is applicable, and specifically states that the rules with reference to the consumption of alcoholic beverages is in the interest of public safety and one that is respected by the public. In so ruling we do not attempt to override or sustain any other awards of discipline but have decided this case on the facts and the merits of this case only.

I. The Board finds that the Company was justified in a disciplinary action against Captain Rall by reason of the facts in the case but not to the extent of discharge.

II. The Board further feels that the date of his discharge should be effective as of February 28, 1964, and does

not feel that it is proper to make discharge retroactive.

III. It is, therefore, ordered that Captain Rall should be reinstated effective as of November 1, 1964, with full pay from November 1, 1964, but that he be denied any compensation for the period of time from the date of his dismissal on February 28, 1964, to October 31, 1964, and that his discipline shall not in any way affect his seniority, accruals, assignments, and all other employee privileges.

Respectfully submitted,

Walter L. Gray,
Referee.

APPROVED FOR ALPA:

Leslie C. McQuain
George A. Stone

DISSENT FOR NORTHWEST AIRLINES, INC.

A. E. Floan (dissent)
Ronald E. Stelzig (dissent)

(Dated as Entered on January 8, 1965.)

[January 8, 1965 System Board of Adjustment Dissent—Rall]

In the Matter of Arbitration Between Northwest Airlines, Inc. and Air Line Pilots Association Re: Captain David G. Rall.	ALPA Case No. 5562.

DISSENT OF COMPANY MEMBERS.

The Company members of the System Board of Adjustment dissent from the decision and award of the majority in the above entitled matter for the following reasons:

1. The award fails to recognize that the admitted violation by Rall of the rule which provides that drinking alcoholic beverages within 24 hours of a flight was ground for discharge.

2. The majority had no authority to modify the penalty assessed against the grievant. Under the provisions of the collective bargaining agreement between the Company and ALPA, the System Board is only empowered to exonerate the grievant or affirm the disciplinary action taken and has no power to reinstate without exoneration; in other words, the Board may reverse or affirm, but cannot substitute its judgment for that of the Company with respect to the penalty.

3. The majority erred in attempting to reimburse the grievant for the period February 9—February 28, 1964. This attempt to change the effective date of discharge was entirely unwarranted because it was

not in issue, had not been raised by the Union, nor at any time presented for determination in brief or argument.

4. The decision of the majority ignores the following evidence regarding the grievant's condition on January 1, 1964:

a. Two eye witnesses (Smed and Faria) who observed the grievant at approximately 6:00 a. m. on January 1, 1964, testified that he appeared to be under the influence of alcohol and that they closed the door of the aircraft to prevent his falling out.

b. Navigator Harper testified that he considered and treated the grievant as intoxicated.

c. The grievant admitted that he concealed himself on the aircraft for an hour and a half prior to its departure from Hickam AFB to avoid being seen by MATS personnel.

d. The grievant also admitted that he concealed himself on the airplane to avoid being seen at Johnston Island.

e. The grievant admitted that he failed to perform his assigned duties at Hickam AFB, i. e., failed to attend the weather briefing, failed to participate in the flight planning, failed to sign the flight plan which was signed by another crew member, etc.

f. The grievant admitted that it was his own evaluation of his condition at the hotel that he was too sick to serve on the flight.

Accordingly, we submit that the majority has disregarded the realities of the evidence of record and has

deliberately glossed over the evidence of the grievant's dereliction with respect to proper concern and responsibility for the safety of the flight.

A. E. Floan,
Company Member,
Ronald E. Stelzig,
Company Member.

[January 8, 1965 System Board of Adjustment Award—Lee]

In the Matter of Arbitration
Between
Northwest Air Lines, Incorporated
and
Air Line Pilots Association, Intnl.
In Re: R. E. Lee Discharge.

ALPA Case No. 5563.

AWARD.

This matter comes on to be heard before a five man board of adjustment on Monday, November 16, 1964, and ended on the 17th day of November, 1964. Said hearings were held in the Conference Room located in the Executive Offices of the Northwest Airlines, Minneapolis-St. Paul, Minnesota.

The members of the System Board of Adjustment are:

Walter L. Gray, Referee
Leslie C. McQuain, Air Line Pilots Association
George A. Stone, Air Line Pilots Association
A. E. Floan, Northwest Airlines, Inc.
Ronald E. Stelzig, Northwest Airlines, Inc.

James A. Abbott appeared as counsel representing Northwest Airlines, Inc. John G. Loomos of the Legal Department of the Air Line Pilots Association appeared as counsel representing Robert E. Lee.

Company's Statement of Facts.

I. Evidence as disclosed at the hearing showed that Robert E. Lee was a copilot on a MATS charter flight designated as Flight NO27 of January 1, 1964, which flew from Hickam Air Force Base in Honolulu, Hawaii, to Eniwetok with stops at Johnston Island and Kwajalein Island.

II. The charges as filed against copilot Robert E. Lee are as follows: "You served as pilot and second-in-command on Flight NO27 on January 1, 1964, with a first pilot having an apparent physical deficiency contrary to your responsibility with respect to the safety of the flight."

III. The evidence discloses that copilot Robert E. Lee has worked for the Northwest Airlines since July 17, 1948, and that he went to work as a copilot on that day. In 1959 he was qualified as a captain ATR type rating on a DC3 as well as a DC6 and DC7. However, he was not in the capacity of captain on the flight in question.

Grievants Statement of Facts.

I. It was the contention of copilot Robert E. Lee that he was notified on December 31, 1963, about 6:00 p. m. that he was to be a member of the flight crew on January 1, 1964, at 7:00 a. m on NO27.

II. He testified that he did not see Captain David G. Rall until about 6:25 a. m. on January 1, 1964.

He further testified that he had heard gossip to the effect that Captain Rall was incapacitated to take out the flight, but that after talking to Captain Rall, he, copilot Robert E. Lee, testified that he felt it was safe to proceed on the flight. That he was directed by Captain Rall to take out the flight and that Captain Rall would bring it back. Then the flight went off without incident.

OPINION.

I. The Board recognizes the safety rule and specifically states that the interest of public safety is paramount at all times; that any pilot or copilot who does not have this rule constantly in mind is not working in the interest of the company and certainly not in the interest of the public. The System Board must, therefore, determine whether or not the discharge was justified under the circumstances as brought out in the evidence of the case.

II. It has been repeatedly held, and we have so held in a companion case, that discharge is the capital punishment of employee-employer relations and that the company has the right to punish an employee but it must be kept uppermost in the minds of this Board whether or not, under the circumstances involved in this case, there was sufficient evidence to justify the discharge of copilot Lee.

III. In view of the statements that had been relayed to him by other crew members the wise course of action might have been to have discussed the entire matter with the station manager.

IV. The majority of the Board feels that discharge is too severe in view of all the facts and mitigating evi-

dence. Copilot Lee felt that he had exercised proper discretion in taking out the flight especially when he had been directed by his superior, Captain Rall, to "fly the trip out". But because he did not exercise extensive caution in view of what he had heard that some discipline should be imposed.

V. It is, therefore, ordered that copilot Robert E. Lee be reinstated effective as of May 1, 1964, with full pay from May 1, 1964. That he be denied any compensation for the period of time from February 28, 1964, to May 1, 1964, and that his discharge shall not in any way affect his seniority, accruals, assignments, and all other employee privileges.

Respectfully submitted,

Walter L. Gray,
Referee.

APPROVED FOR ALPA:

Leslie C. McQuain
George A. Stone

DISSENT FOR NORTHWEST AIRLINES, INC.

A. E. Floan (Dissent)
Ronald E. Stelzig (Dissent)

(Dated and Entered on January 8, 1965.)

[January 8, 1965 System Board of Adjustment Dissent—Lee.]

In the Matter of Arbitration Between Northwest Airlines, Inc. and Air Line Pilots Association Re: R. E. Lee Discharge.	ALPA Case No. 5563.

DISSENT OF COMPANY MEMBERS.

The Company members of the System Board of Adjustment dissent from the decision and award of the majority in the above entitled matter for the following reasons:

1. The majority had no authority to modify the penalty assessed against the grievant. Under the provisions of the collective bargaining agreement between the Company and ALPA, the System Board is only empowered to exonerate the grievant or affirm the disciplinary action taken and has no power to reinstate without exoneration; in other words, the Board may reverse or affirm, but cannot substitute its judgment for that of the Company with respect to the penalty.

2. The majority erred in attempting to reimburse the grievant for the period February 9-February 28, 1964. This attempt to change the effective date of discharge was entirely unwarranted because it was not in issue, had not been raised by the Union, nor at any time presented for determination in brief or argument.

3. The decision of the majority ignores the following evidence:

a. Two eye witnesses (Smed and Faria) who observed Captain Rall at approximately 6:00

a. m. on January 1 testified that he appeared to be under the influence of alcohol and that they closed the door of the aircraft to prevent his falling out.

b. Navigator Harper testified that he considered and treated Captain Rall as intoxicated.

c. The grievant had admitted to Mr. Justiss that when he got into the cockpit of the airplane he found Captain Rall asleep, his speech was slurred and he regarded him as drunk and unable to function on the first leg of the outgoing portion of the flight to Johnston Island.

d. The grievant waited an hour after being told that Rall was "drunker than a skunk" before making an investigation of what he had heard and at no time did he probe the basis thereof.

e. The grievant knew that Rall did not perform the normal Captain's duties at Hickam AFB, i. e., failed to participate in the flight planning, failed to sign the flight plan, etc., and had proceeded directly to the aircraft on reaching the airport and concealed himself therein so as to avoid being seen.

Accordingly, we submit that the majority has disregarded the realities of the evidence of record and has deliberately glossed over the evidence of the grievant's dereliction with respect to proper concern and responsibility for the safety of the flight.

A. E. Floan, Company Member,
Ronald E. Stelzig, Company Member.

[August 6, 1965 District Court Order.]

United States District Court,
District of Minnesota,
Fourth Division.

4-65 Civ. 40.

Airline Pilots Association International, David G. Rall and R. E. Lee,

Petitioners,

vs.

Northwest Airlines, Inc.,

Respondent.

ORDER.

This is an action under 45 USCA, § 153 First (p) for enforcement of an order of the local System Board of Adjustment granting reinstatement of the petitioners as employees of respondent, Northwest Airlines, Inc., restoring seniority rights, and granting some back pay. Respondent refused to comply with the award. Thereafter, petitioners brought this proceeding to enforce the Board's order. Petitioners now seek summary judgment on the record. Respondent contends that it is entitled to a trial *de novo* in this proceeding.

Mr. Leonard E. Lindquist and Mr. Richard E. Wetherall, of Messrs. Lindquist, Magnuson and Glennon, Minneapolis, Minnesota (Mr. Harry Noe, Chicago, Illinois, of counsel), appeared in behalf of the petitioners;

and

Mr. Henry Halladay and Mr. John M. Mason, of Messrs. Dorsey, Owen, Marquart, Windhorst and West, Minneapolis, Minnesota, appeared in behalf of the respondent.

Petitioner Rall, a first pilot for Northwest Airlines, was discharged for an alleged violation of the respondent's rule against drinking an alcoholic beverage within a twenty-four hour period before departure of a flight on which he was a crew member. Petitioner Lee, a co-pilot, was discharged for acting as a first pilot on the flight with Rall, knowing that the latter had an apparent physical deficiency from drinking alcoholic beverages.

After these petitioners were notified of their discharge, hearings were held before management officials who sustained their discharge, and thereafter both Rall and Lee submitted the dispute to the local System Board of Adjustment pursuant to the provisions of the Railway Labor Act, 44 Stat. 577 (1926), 45 USC, §§ 151 et seq., made applicable to air carriers, 49 Stat. 1189 (1936), 45 USC, § 184. Thus, the provisions of 45 USC, §§ 151, et seq., are relevant here. See **International Assn. of Machinists v. Central Airlines, Inc.**, 372 U. S. 682 (1963). The hearings before the System Board of Adjustment as to Rall were held in October, 1964, and as to Lee in November, 1964. The decision of the five-man Board, two dissenting, reinstating these petitioners to the service of respondent with some back pay was rendered January 8, 1965. This action was commenced by petitioners on February 11, 1965.

The issues presented by respondent's contention that it is entitled to a trial *de novo* arrive from the language employed in two sections of the Act. 45 USC 153 First (m) provides for awards and reads:

"The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute."

No provision is made in this section for the enforcement of the awards, but if the carrier does not comply with an award for an employee, he may petition for enforcement in this Court through 45 USC, § 153 First (p). This section reads:

"If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of

the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

At the outset, it should be stated that the question of a trial *de novo* in this Court is not dependent upon the restoration of certain back pay to these petitioners. Respondent does not contend that it is entitled to a trial *de novo* on the grounds that a money award is involved as stated in Section 153 First (m), 45 USC. It recognizes that the issue of a money award is severable from the issue of the reinstatement of these two petitioners as ordered by the Board. It is respondent's position that, under Section 153 First (p), it is entitled to a trial *de novo* on the issue of the Board's determination that these employees were wrongfully discharged and as to their reinstatement. Its position is that, although the findings and order of the System Board of Adjustment is prima facie evidence of the facts therein stated, it is entitled to offer evidence to overcome the petitioners' prima facie case. If respondent is entitled under the law to offer evidence in this enforcement proceeding, it necessarily follows on this showing that petitioners' motion for a summary judgment must be denied. They have not shown an absence of any genuine issue of fact to be tried in this proceeding.

These petitioners have sought redress for an alleged wrongful discharge before the Board. They obtained findings and an order of reinstatement, with certain back pay, and seek its enforcement in this Court. Under these circumstances, the decisions overwhelmingly sustain the

right of the carrier to a trial *de novo* in the enforcement proceedings. **Washington Terminal Co. v. Boswell**, 124 F. 2d 235 (D. C. Cir. 1941), aff'd., 319 U. S. 732 (1943); **Brotherhood of R. R. Trainmen v. Louisville & N. R. R.**, 334 F. 2d 79 (5 Cir. 1964); **Callan v. Great Northern Ry. Co.**, 299 F. 2d 908 (5 Cir. 1961); **Boos v. Railway Express Agency, Inc.**, 253 F. 2d 896 (8 Cir. 1958); **Brotherhood of Ry. and S. S. Clerks v. Atlantic Coast Line R. R.**, 253 F. 2d 753 (4 Cir. 1958); **Kirby v. Pennsylvania R. Co.**, 188 F. 2d 793 (3 Cir. 1951); **Dahlberg v. Pittsburgh & L. E. R. Co.**, 138 F. 2d 121 (3 Cir. 1943); **Hanson v. Chesapeake & O. Ry.**, 236 F. Supp. 56 (S. D. W. Va. 1964); **Order of R. R. Telegraphers v. Union Pacific R. R.**, 231 F. Supp. 33 (D. Colo. 1964); **Ward v. New Orleans Public Belt R. R. Comm'n**, 97 F. Supp. 1002 (E. D. La. 1951).

Petitioners point out, however, that if the findings of the Board had been adverse to their petition, there would be no occasion for enforcement proceedings and that the cases hold that the decision of the Board under such circumstances is final except in a money award and that they therefore would have no recourse to the courts on the question of their discharge. But this situation was recognized by the Supreme Court in **Union Pacific Ry. Co. v. Price**, 360 U. S. 601, 615-16 (1959), where the court states,

> "* * * The disparity in judicial review of Adjustment Board orders, if it can be said to be unfair at all, was explicitly created by Congress, and it is for Congress to say whether it ought to be removed."

And in the interpretation of this decision, reference may be made to the three dissenters who emphasized this disparity, indicating that it might be of Constitutional dimensions, and urged that review in the courts should not depend upon the outcome of the Board's determination. In other words, the dissenters argued that there should be a *de novo* review whether the decision of the Board

was in favor of or against the employee's position in non-money awards.

These petitioners urge that the courts should not assume to delve into this dispute between the carrier and the employees in that the entire design and purpose of the Act was to submit such matters to an Adjustment Board which would be far better equipped and informed so as to be able to determine and decide the dispute in a manner which would secure more adequately labor and management harmony and understanding. But no good purpose would be served in attempting to discuss questions which rest with, and have been determined by, Congress, although admittedly courts are frequently called upon to decide many matters involving problems arising between employer and employees. It may be pointed out, however, that with the decision of the Board reinstating these employees being prima facie evidence of the facts therein stated, the protection granted them against costs and the allowance of attorneys' fees if they finally prevail, suggests that in granting petitioners the right to institute an action to enforce the award of an Adjustment Board, Congress had in mind the necessity of safeguarding their rights under such circumstances. It is true that the alleged disparity as between employees and carriers in seeking a review of an order of the Adjustment Board may have led to some misunderstanding.

In **Russ v. Southern Railway Company**, 334 F. 2d 224 (6 Cir. 1964), in reviewing an enforcement proceeding of a money award, the Circuit Court mentioned that there was correctly a *de novo* review in the District Court, but went further and stated that "An award which does not contain an order for the payment of money is final and binding on both parties to a dispute" (p. 227). In making this statement, the court cited **Brotherhood of Locomotive Engineers v. Louisville & Nashville R. Co.**, 373 U. S. 33 (1963) where it was stated:

> "* * * We do not deal here with nonmoney awards, which are made 'final and binding' by § 3 First (m). The only portion of the award which presently remains unsettled is the dispute concerning the computation of Humphries' 'time lost' award, an issue wholly separable from the merits of the wrongful discharge issue. This, then, is clearly a controversy concerning a 'money award', as to which decisions of the Adjustment Board are not final and binding" (pp. 40-41).

However, this language of the Supreme Court was discussed in **Brotherhood of R. R. Trainmen v. Louisville & N. R. R.**, 334 F. 2d 79, 82 (5 Cir. 1964), cert. denied, 379 U. S. 934, rehearing denied, 379 U. S. 986 (1965):

> "We would hesitate to overrule such a well-established precedent on the basis of dictum concerning an issue with which the Court expressly stated it did not deal; it certainly is not a clear mandate for a change. Moreover, we cannot agree that the language used compels the conclusion, as appellants contend, that the Supreme Court intends that a non-money award should be enforced without *de novo* review on the merits. The language in the above quoted passage merely paraphrases the statute; the Court reiterates that awards are final and binding except insofar as they contain a money award, as section 153 (m) provides. The Court then refers to section 153 (p) to find the mechanism for making a money award final. The fact that non-money awards are made final by a Board order whereas money awards are not, has not been questioned; this, however, does not touch upon the procedure for enforcement of the awards which the Court of Appeals authorities uniformly recognize must be a trial *de novo* on the merits for both types of awards. That the Supreme Court in

the Brotherhood of Locomotive Engineers case did not intend to overturn these settled precedents may at least be inferred from the Court's two citations, 373 U. S. at 39, 41, 83 S. Ct. 1059, with apparent approval of Washington Terminal Co. v. Boswell, supra, which is the landmark case for *de novo* review. We recognize, of course, that the two dissenting Justices drew the opposing inference from the Court's opinion."

Petitioners emphasize **Capital Airways, Inv. v. Air Line Pilots Ass'n Int'l**, 237 F. Supp. 373 (M. D. Tenn. 1963), rev'd in part on other grounds, 341 F. 2d 288 (6 Cir. 1965), where two airline employees were ordered reinstated without back pay and the court granted a summary judgment in their favor. The action, however, was not an enforcement proceeding, but a declaratory judgment action and the only issue presented, resolved in favor of the employees, was whether the Board had authority to order reinstatement although it found the employees guilty of the charges made by the Airlines. The issue of a *de novo* review was not presented at that time.

The Court has considered the many cases cited by the petitioners in support of their position, but outside of certain dicta it seems clear that the decided weight of authority sustains respondent's right to a trial *de novo* in this proceeding.

Finally, reference may be made to the provision of the contract between Northwest Airlines and the Airline Pilots Association to the effect that the decision of the System Board of Adjustment shall be "final and binding." But this provision merely copies the language of the statute, and at least, without more, should not be held to take away rights under the Act expressly granted to the carrier by Congress and which were reserved by this respondent.

In that the petitioners have not made it appear that there is an absence of any genuine issue of fact to be determined in this proceeding, it necessarily follows that their motion for a summary judgment must be denied. It is so ordered. An exception is allowed.

Dated this 6th day of August, 1965.

By the Court:
GUNNAR H. NORDBYE,
Judge.

[August 24, 1965 District Court Order.]

United States District Court,
District of Minnesota,
Fourth Division.

4-65 Civ. 40.

Airline Pilots Association International,
David G. Rall and R. E. Lee,
Petitioners,

vs.

Northwest Airlines, Inc.,
Respondent.

ORDER.

Petitioners have filed a motion to amend the Findings and Order of this Court filed on August 6, 1965, in the above proceeding by including a provision which will

permit petitioners to appeal from this order as authorized by 28 U. S. C., § 1292 (b).

Messrs. Lindquist, Magnuson & Glennon, by Mr. Leonard E. Lindquist, Minneapolis, Minnesota (Mr. Harry Noe, Chicago, Illinois, of counsel), appeared in behalf of the petitioners;

and

Messrs. Dorsey, Owen, Marquart, Windhorst & West, by Mr. Henry Halladay, Minneapolis, Minnesota, in behalf of the respondent.

The Court cannot in good conscience state that there is a substantial ground for a difference of opinion as to the right of respondent under the law to have a trial *de novo* in this proceeding in light of the clear weight of authority which upholds respondent's position in this regard. However, in that the Eighth Circuit has not directly ruled upon this question and in that the Court's order of August 6, 1965, involves a controlling question of law, an appeal therefrom may materially advance the termination of the litigation. In seeking this appeal, petitioners are proceeding in good faith and sincerely contend that their position as to this controlling question of law is sound. Therefore, this Court certifies that there is reasonable ground for a difference of opinion, and concludes that this question is one in which a Court of Appeals in its discretion should permit an appeal. If the appeal is granted, then this Court will stay proceedings herein pending the determination thereof. It is so ordered.

Dated this 24th day of August, 1965.

By the Court:
Gunnar H. Nordbye,
Judge.

[October 13, 1965 Court of Appeals Denial of Leave to Take Interlocutory Appeal.]

United States Court of Appeals
for the Eighth Circuit.

No. 369.

Air Line Pilots Association, International, David G. Rall and R. E. Lee,

Petitioners,

vs.

Northwest Airlines, Inc.,

Respondent.

ORDER DENYING LEAVE TO TAKE INTERLOCUTORY APPEAL.

(Filed October 13, 1965.)

Before Van Oosterhout and Mehaffy, Circuit Judges.

Per Curiam.

Petitioners seek leave to take an interlocutory appeal pursuant to 28 U. S. C. A., § 1292 (b), from order denying their motion for summary judgment filed August 6, 1965. Petitioners filed a complaint under 45 U. S. C. A., § 153 First (p), for enforcement of the order of a local System Board of Adjustment granting reinstatement of employment to petitioners, restoring seniority rights, and granting back pay. Respondent resisted the motion, filing sup-

porting affidavits. The asserted controlling issue of law is whether respondent is entitled to a trial de novo in this proceeding.

The trial court, in a comprehensive memorandum opinion citing numerous supporting authorities, held that the right to a trial de novo was conferred by statute and that genuine disputed fact issues exist. The motion was denied. In a supplemental order dated August 24, 1965, the Court states:

> "The Court cannot in good conscience state that there is a substantial ground for a difference of opinion as to the right of the respondent under the law to have a trial de novo in this proceeding in light of the clear weight of authority which upholds respondent's position in this regard. However, in that the Eighth Circuit has not directly ruled upon this question and in that the Court's order of August 6, 1965, involves a controlling question of law, an appeal therefrom may materially advance the termination of the litigation. In seeking this appeal, petitioners are proceeding in good faith and sincerely contend that their position as to this controlling question of law is sound. Therefore, this Court certifies that there is reasonable ground for a difference of opinion, and concludes that this question is one in which a Court of Appeals in its discretion should permit an appeal."

We do not believe the foregoing meets the required § 1292 (b) finding that there is substantial difference of opinion on the legal issue. Reasonable and good faith difference of opinion fall somewhat short of being "substantial ground for difference of opinion."

Moreover, we do not believe the petitioners have made the showing required by the statute or by our Rule 28 with respect to an interlocutory appeal materially advancing the ultimate termination of the litigation. The

factual issues raised do not appear to be particularly complex or to be of such a nature as would require a protracted trial.

The general rule prohibiting interlocutory appeals and the policy underlying such rule still remains. Section 1292 (b) should be construed with reasonable strictness and should be applied only in situations falling within the letter and spirit of the statute. See Fleischer v. Phillips, 2 Cir., 264 F. 2d 515; Milbert v. Bison Laboratories, Inc., 3 Cir., 260 F. 2d 431; Dearborn Stove Co. v. Farmers Union Cooperative Gas & Oil Co., 8 Cir., 304 F. 2d 273; Wright, The Interlocutory Appeals Act of 1958, 23 F. R. D. 199, 204; 6 Moore, Federal Practice, § 54.07 (1964 Supp.).

Respondent in its answer alleges the awards of the Board exceeded its authority, that the awards are arbitrary, capricious and unreasonable, and that due process of law was not accorded. Thus even if a full trial de novo should not be available, petitioners have not met the burden imposed upon them to show that no genuine issue of fact remains.

In the exercise of the discretion vested in us, we deny the motion for leave to take an interlocutory appeal.

Dated October 11, 1965.

[March 7, 1966 District Court Order.]

United States District Court,
District of Minnesota,
Fourth Division.

Air Line Pilots Association International, David G. Rall and R. E. Lee, Petitioners, vs. Northwest Airlines, Inc., Respondent.	4-65 Civ. 40.

ORDER.

Appearances:

Mr. Leonard E. Lindquist and Mr. Richard E. Wetherall, of Messrs. Lindquist, Magnuson and Glennon, Minneapolis, Minnesota (Mr. Harry Noe, Chicago, Illinois, of counsel), for petitioners;

Mr. Henry Halladay and Mr. John M. Mason, of Messrs. Dorsey, Owen, Marquart, Windhorst and West, Minneapolis, Minnesota, for respondent.

This proceeding is again before the Court on a motion for summary judgment by the petitioners. This Court in its order of August 6, 1965, held that the respondent was entitled to relitigate *de novo* the factual issue decided by the System Board of Adjustment under the provisions of Sections 151, et seq., 45 U. S. C., as amended, hereinafter called the Act.

The second motion is based upon a recent decision of the Supreme Court of the United States entitled **F. J. Gunther v. San Diego & Arizona Eastern Railway Com-**

pany, decided December 8, 1965. The issue now presented is the same as that which arose initially in these proceedings, and that is whether fn view of **Gunther** the respondent is entitled to a trial *de novo* in a court of law as to the propriety of the discharge of petitioners Rall and Lee and the penalty imposed for their infraction of the rules of the respondent. If the decision of the System Board of Adjustment with respect to the discipline which should be accorded these petitioners by reason of their violation of the carrier's rules has been "fmally, completely, and irrevocably" settled by the Board's decision, then it must follow that this Court has no jurisdiction herein except as to the computation of the money award to be allowed unless there are genuine issues of law or fact raised by the respondent's second and third defenses. The pertinent portions of the System Board's opinions as to these petitioners are set forth in the footnote.[1]

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[1] "In the Matter of Arbitration

Between
NORTHWEST AIR LINES, INCORPORATED
and
AIR LINE PILOTS ASSOCIATION, INTNL.
IN RE: **CAPTAIN DAVID G. RALL**

* * * * * * *

OPINION.

The Board in this ruling in no way seeks to set aside any public safety rule, where this rule is applicable, and specifically states that the rules with reference to the consumption of alcoholic beverages is in the interest of public safety and one that is respected by the public. In so ruling we do not attempt to override or sustain any other awards of discipline but have decided this case on the facts and the merits of this case only.

I. The Board finds that the Company was justified in a disciplinary action against Captain Rall by reason of the facts in the case but not to the extent of discharge.

II. The Board further feels that the date of his discharge should be effective as of February 28, 1964, and does not feel that it is proper to make discharge retroactive.

III. It is, therefore, ordered that Captain Rall should be reinstated effective as of November 1, 1964, with full pay from

Gunther was an engineer on the San Diego & Arizona Eastern Railway, and shortly after his seventy-first birthday he was removed by the Railway as an engineer because of an alleged heart disability. Later he requested the Railway to permit the selection of a three-doctor panel

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November 1, 1964, but that he be denied any compensation for the period of time from the date of his dismissal on February 28, 1964, to October 31, 1964, and that his discipline shall not in any way affect his seniority, accruals, assignments, and all other employee privileges."

IN RE: **R. E. LEE DISCHARGE**

* * * * * * *

OPINION.

"I. The Board recognizes the safety rule and specifically states that the interest of public safety is paramount at all times; that any pilot or copilot who does not have this rule constantly in mind is not working in the interest of the company and certainly not in the interest of the public. The System Board must, therefore, determine whether or not the discharge was justified under the circumstances as brought out in the evidence of the case.

II. It has been repeatedly held, and we have so held in a companion case, that discharge is the capital punishment of employee-employer relations and that the company has the right to punish an employee but it must be kept uppermost in the minds of this Board whether or not, under the circumstances involved in this case, there was sufficient evidence to justify the discharge of copilot Lee.

III. In view of the statements that had been relayed to him by other crew members the wise course of action might have been to have discussed the entire matter with the station manager.

IV. The majority of the Board feels that discharge is too severe in view of all the facts and mitigating evidence. Copilot Lee felt that he had exercised proper discretion in taking out the flight especially when he had been directed by his superior, Captain Rall, to 'fly the trip out'. But because he did not exercise extensive caution in view of what he had heard that some discipline should be imposed.

V. It is, therefore, ordered that copilot Robert E. Lee be reinstated effective as of May 1, 1964, with full pay from May 1, 1964. That he be denied any compensation for the period of time from February 28, 1964, to May 1, 1964, and that his discharge shall not in any way affect his seniority, accruals, assignments, and all other employee privileges."

to examine him and determine his qualifications to return to service. This proposal was not accepted by the Railway. Thereupon Gunther filed a claim with the Railroad Adjustment Board for reinstatement and back pay contending that he was qualified physically to continue with his work as an engineer. The Adjustment Board, over the protest of the Railway, assumed jurisdiction, and in alleged conformance with past practices in similar cases, appointed a committee or panel of three physicians, one selected by Gunther, one by the Railway, and the third by the two so selected. This panel of physicians examined Gunther and by a majority vote determined that he was physically qualified to act as an engineer, and therefore the Board ordered Gunther to be reinstated as an engineer for the Railway with restoration of back pay. The Railway refused to comply, and thereupon Gunther filed an action in District Court to enforce the Adjustment Board's award.

There are two reported decisions of the trial court in **Gunther**, 192 F. Supp. 882, and 198 F. Supp. 402, and a third decision, not reported, dated March 29, 1963. In the District Court, as well as in the Court of Appeals, 336 F. 2d 543, the decisions were based upon the premise that the Board had no authority to determine whether Gunther was physically fit for his duties as a railway engineer in absence of express or implied authority in the collective bargaining contract, and therefore concluded that the question of his qualifications was reserved exclusively for the management. The Supreme Court, however, not only held that the Board's decision as to the construction of the collective bargaining provisions of the contract must be sustained, but that on the record the appointment of a committee of doctors to determine Gunther's fitness for his job as an engineer on the San Diego & Arizona Eastern Railway was fully in accord with the present general practices on that railroad and on other railroads as well.

Finally, it determined that regardless of Section 153 First (m), and its provision that the awards of Railroad Adjustment Boards "shall be final and binding upon both parties to the dispute except insofar as they shall contain a money award," a Federal District Court was not allowed to review "an Adjustment Board's determination of the merits of a grievance merely because a part of the Board's award, growing from its determination on the merits, is a money award" (p. 7, slip opinion), and concluded with this statement,

> "* * * The basic grievance here—that is, the complaint that petitioner has been wrongfully removed from active service as an engineer because of health—has been finally, completely, and irrevocably settled by the Adjustment Board's decision. Consequently, the merits of the wrongful removal issue as decided by the Adjustment Board must be accepted by the District Court."

The Supreme Court further stated (pp. 4-5, ibid.),

> "* * * Congress, in the Railway Labor Act, invested the Adjustment Board with the broad power to arbitrate grievances and plainly intended that interpretation of these controversial provisions should be submitted for the decision of railroad men, both workers and management, acting on the Adjustment Board with their long experience and accepted expertise in this field."

It also said that its prior decisions had made it clear that Adjustment Board provisions were to be considered "a mandatory, exclusive, and comprehensive system for resolving grievance disputes," as the "complete and final means for settling minor disputes," and as "compulsory arbitration in this limited field," citing **Locomotive Engineers v. Louisville & Nashville R. Co.**, 373 U. S. 33, 38, 39, 40. In addition, the court cited **Slocum v. Delaware,**

L. & W. R. Co., 339 U. S. 239, 243-44; **Brotherhood of Railroad Trainmen et al. v. Chicago River & Indiana R. Co.**, 353 U. S. 31; **Union Pacific R. Co. v. Price**, 360 U. S. 601. It made no reference to the numerous decisions holding that in a money award under Section 153 First (p), in an enforcement proceeding therefor by the employee, there was to be a trial *de novo* under that section.

However, it is now perfectly clear, regardless of the past decisions of the Supreme Court and the construction given thereto by its dissenting opinion (see Justice Goldberg's dissent in **Locomotive Engineers v. Louisville & N. R. Co.**, 373 U. S. 33, 43, and Justice Douglas's dissent in **Union Pacific R. Co. v. Price**, 360 U. S. 601), that in **Gunther** the court summarily has swept aside all former uncertainty as to the intent of Congress in the enactment of Section 153 of the Railway Labor Act and particularly as to Sections 153 First (m) and 153 First (p). Now, it must be recognized that the former enigma appearing in many of the prior decisions no longer exists, to wit, that if an employee loses before the Board and the carrier wins, there is no trial *de novo* by the court, but if the employee wins and the carrier loses, a trial *de novo* would be accorded in an enforcement proceeding by the employee. **Gunther** has limited the trial *de novo* to the back pay due the employee under the Board's award and any other issue decided by the Board is to be accepted by the District Court. In other words, the court must accept the findings of the Board and is empowered to enforce them by mandamus or otherwise. The only fact issue for the court to determine is the amount of the money award based on the Board's findings and such additional evidence as may bear upon the amount.

In the instant proceeding, the System Board of Adjustment is recognized as a statutory board which came into existence under the Railway Labor Act, 45 U. S. C., § 151,

et seq., as amended. There is no adequate showing to sustain respondent's position that there is any distinction as to the application of Section 153 of the Act as between the railways and the airlines. Respondent in this proceeding at all times relied upon the construction given by the courts to Sections 153 First (m) and 153 First (p) of the Act as the basis for its contention that it is entitled to a trial *de novo* with reference to the discipline that should be imposed upon these petitioners by reason of their violation of the rules of the company. Now that the Supreme Court has construed these sections in **Gunther**, it must necessarily follow that its construction thereof is binding upon this respondent.

The argument that the parties in setting up the System Board of Adjustment may have assumed that a decision by the System Board would not be final where a money award is concerned, in light of the apparent prior court construction accorded to the National Railroad Adjustment Act, cannot avail respondent. In **Gunther**, the Supreme Court did not assume to overrule any of its former decisions, but according to Justice Black, merely construed Sections 153 First (m) and 153 First (p), in accordance with its former pronouncements. Neither is there any showing which would justify a finding that the Airline Pilots Association and the Northwest Airlines contracted with each other in the belief and understanding that the decisions of the Board would not be complete and irrevocable. It may be noted that the contract between Northwest Airlines and the Air Line Pilots Association provided that the System Board of Adjustment's decisions shall be final and binding. The alleged nondelegable duty resting upon the Airline to determine for itself the punishment which should be meted out to gross violators of its rules in order to insure maximum safety to its patrons has its counterpart in a lesser degree in **Gunther**, where management had determined that the physical condition

of Gunther made it unsafe to have him continue his employment in the capacity of an engineer, and of course the issue as to the punishment which should be imposed on the petitioners for their aggravated violation of the company rules was voluntarily submitted to the System Board by both parties. The fact that the National Railway Adjustment Board was set up by Congress, and the System Board of Adjustment was created by mutual consent and tacked on to the Railway Labor Act, does not present a situation which suggests that there should be any difference in the construction of the statutory provisions of the Act to which both Boards were subject.

The factual differences between **Gunther** and the instant proceeding do not suggest that there should be any different interpretation of the Act. Here, the System Board found that these petitioners had violated the rules of the company, but it concluded that the penalty of an absolute discharge was too severe. It concluded that, as to Rall, his severance from service for some eight months without any allowance for pay during that period was adequate punishment for his offense, and, as to Lee, it concluded that a severance from service without pay for some two months was a just sentence. Whether the Board had any particular background or expertise in determining the discipline which should be imposed on these two petitioners under the circumstances does not appear. But surely their contact and knowledge of comparable instances on airlines must at least exceed any "expertise" that the average court would have in that field. This Court is fully aware of the tremendous importance of safety rules promulgated for airline pilots in order to insure safety for the traveling public. But unless the discipline which was meted out to these two airline employees is so arbitrary and capricious that it is "wholly baseless and completely without reason" (p. 4, **Gunther**), this Court has no alternative but to follow the teachings of **Gunther.**

It follows, therefore, that petitioner's motion for summary judgment is partially granted as follows:

(a) The award of the System Board of Adjustment as to the discipline which should be imposed upon these petitioners for their infraction of the company rules on January 1, 1964, is adjudged to be final in absence of a showing that the decision of the Board is so arbitrary and capricious that in the words of **Gunther** it is "wholly baseless and completely without reason."

(b) The question as to whether the award of the System Board is so arbitrary and capricious that it must be set aside must be determined on the record before the System Board of Adjustment.[2]

(c) In absence of a finding that the System Board award was arbitrary and capricious, the amount of the money award to be allowed these petitioners will be determined by this Court in light of the finality of the decision as declared herein and on such additional evidence as may be relevant thereto.

Jurisdiction is retained for the purposes indicated above and for any further relief to which petitioners are entitled under the Act.

It is so ordered. Exceptions are reserved.

Dated this 7th day of March, 1966.

By the Court:

GUNNAR H. NORDBYE,
Judge.

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[2] If the rulings of the Board are arbitrary or capricious as to the penalty to be accorded these petitioners, that question necessarily must be determined on the record before it—not on additional evidence which the respondent has suggested and which evidence the Board had no opportunity to consider.

[July 20, 1966 District Court Order.]

United States District Court,
District of Minnesota,
Fourth Division.

4-65 Civ. 40.

Air Line Pilots Association International, David G. Rall and R. E. Lee,

Petitioners,

vs.

Northwest Airlines, Inc.,

Respondent.

ORDER.

Appearances:

Mr. Leonard E. Lindquist, Mr. Edward M. Glennon, and Mr. Richard E. Wetherall, of Messrs. Lindquist, Magnuson and Glennon, Minneapolis, Minnesota, for petitioners;

Mr. Henry Halladay and Mr. John M. Mason, of Messrs. Dorsey, Owen, Marquart, Windhorst and West, Minneapolis, Minnesota, for respondent.

This cause came on for hearing before the undersigned on May 16, 1966, with respect to the Court's order of

March 7, 1966. In its order of August 6, 1965, the Court denied petitioners' motion for a summary judgment, but in its order of March 7, 1966, petitioners were granted a partial summary judgment in reliance upon the teachings of **F. J. Gunther v. San Diego & Arizona Eastern Railway Co.**, 382 U. S. 257. The order of March 7, 1966, granting petitioners a partial summary judgment provided:

> "(a) The award of the System Board of Adjustment as to the discipline which should be imposed upon these petitioners for their infraction of the company rules on January 1, 1964, is adjudged to be final in absence of a showing that the decision of the Board is so arbitrary and capricious that in the words of **Gunther** it is 'wholly baseless and completely without reason.'
>
> "(b) The question as to whether the award of the System Board is so arbitrary and capricious that it must be set aside must be determined on the record before the System Board of Adjustment.
>
> "(c) In absence of a finding that the System Board was arbitrary and capricious, the amount of the money award to be allowed these petitioners will be determined by this Court in light of the finality of the decision as declared herein and on such additional evidence as may be relevant thereto.
>
> "Jurisdiction is retained for the purposes indicated above and for any further relief to which petitioners are entitled under the Act."

Thereafter, the Court considered the transcripts before the System Board of Adjustment in the matters involving each of the individual petitioners herein and a similar proceeding involving one Franklin E. Todd. After a re-

view of these transcripts, the Court announced to counsel that the award of the System Board of Adjustment in the cases of each of the individual petitioners, David G. Rall and R. E. Lee, was not so arbitrary and capricious that in the words of the **Gunther** case it was "wholly baseless and completely without reason," and therefore the said petitioners were entitled to the entry of a summary judgment in accordance with the Court's order of March 7, 1966.

The Court has been advised that the respondent claims that petitioners are subject to termination or discharge for reasons which have arisen subsequent to the date of their discharge and that it should be permitted to call witnesses from the State of Hawaii and the State of Washington (the States in which the individual petitioners have allegedly resided since their discharge); that if the System Board of Adjustment award is to be sustained in accordance with this Court's order, the amount of back pay due them must depend upon the fact question of their right of employment and extent thereof with the respondent since their discharge; that if the petitioners are not subject to reinstatement for reasons and circumstances which have arisen subsequent to the date of their discharge, or if the period of back pay is to be limited, the taking of evidence with respect thereto would consume considerable time; and that the order granting a partial summary judgment to the petitioners involves a controlling question of law about which there are substantial grounds for a difference of opinion and hence an immediate appeal from this order granting a partial summary judgment seems fully justified.

The Court therefore being fully advised, and upon all the files, records and proceedings herein, including its orders of August 6, 1965, and March 7, 1966, makes the following order:

1. That the respondent, Northwest Airlines, Inc., is not entitled to a *de novo* review of the award of the System Board of Adjustment involving the individual petitioners, David G. Rall and R. E. Lee, with respect to any of the issues alleged in respondent's answer to the petition herein.

2. That the award of the System Board of Adjustment on the records reviewed by the Court in the case of the individual petitioners named herein was not so arbitrary and capricious as to be wholly baseless and completely without reason, and therefore that defense is not sustained.

3. That respondent shall reinstate petitioners to its employ in accordance with Award Nos. 5562 and 5563 of the System Board of Adjustment entered on January 8, 1965, subject, however, to the right of the respondent to limit, discharge or terminate petitioners' employment based upon events occurring or conditions existing after their discharge by the respondent, and the Court reserves jurisdiction to determine whether the events occurring or conditions existing after the discharge of these petitioners affect their right of reinstatement or limit the amount of back pay due them under the System Board's orders, and reserves jurisdiction as to the question of attorneys' fees to be allowed petitioners as provided in Section 153 First (p) of the Railway Labor Act.

4. Judgment shall be entered accordingly. Exceptions are reserved.

5. The enforcement of the order granting petitioners a partial summary judgment as above recited is stayed for a period of ten days from the date hereof to permit respondent to take an appeal therefrom in accordance with Title 28, United States Code, Section 1292 (b), with an appropriate supersedeas bond to be approved by this

Court, and upon such appeal a further stay will be entered herein. Jurisdiction is reserved accordingly.

It is so ordered.

Dated this 20th day of July, 1966.

By the Court:

Gunnar H. Nordbye,
Judge.

MEMORANDUM.

As indicated in the foregoing order, the Court is of the opinion that its order denying Northwest Airlines, Inc., a *de novo* review of the award of the System Board of Adjustment herein involves a controlling question of law about which there is substantial difference of opinion and that an immediate appeal will materially advance the ultimate determination of this litigation.

A lengthy trial on the questions as to matters occurring subsequent to the discharge may be obviated in the event this Court has erred in its determination of the issues relating to *de novo* review and the issue as to whether the determination of the System Board of Adjustment was arbitrary and capricious.

This memorandum is made a part of the foregoing order.

Gunnar H. Nordbye,
Judge.

[August 15, 1966 Court of Appeals Grant of Leave to Take Interlocutory Appeal.]

United States Court of Appeals
For the Eighth Circuit.

No. 18523.

September Term, 1965.

Northwest Airlines, Inc.,

Appellant,

vs.

Air Line Pilots Association, International, David G. Rall and R. E. Lee.

Appeal from the United States District Court for the District of Minnesota.

ORDER.

(Filed August 18, 1966.)

On consideration of an application for leave to take an interlocutory appeal and exhibits in support of the application, it is now here ordered that the application be, and it is hereby granted. The Clerk of this Court is directed to docket the appeal forthwith.

Dated August 15, 1966.

[February 23, 1967 Court of Appeals Opinion (373 F. 2d 136).]

United States Court of Appeals
For the Eighth Circuit.

No. 18,523.

Northwest Airlines, Inc.,
Appellant,

v.

Air Line Pilots Association, International, David G. Rall and R. E. Lee,
Appellees.

Appeal from the United States District Court for the District of Minnesota.

[February 23, 1967.]

Before Van Oosterhout, Blackmun and Mehaffy, Circuit Judges.

Van Oosterhout, Circuit Judge.

This is an appeal by respondent Northwest Airlines, Inc. (NWA), from order entered on July 20, 1966, granting partial summary judgment to petitioners, Air Line Pilots Association (ALPA), David G. Rall and R. E. Lee. The material portions of said order read:

"1. That the respondent, Northwest Airlines, Inc., is not entitled to a de novo review of the award of the System Board of Adjustment involving the individual petitioners, David G. Rall and R. E. Lee, with respect to any of the issues alleged in respondent's answer to the petition herein.

"2. That the award of the System Board of Adjustment on the records reviewed by the Court in the case of the individual petitioners named herein was not so arbitrary and capricious as to be wholly baseless and completely without reason, and therefore that defense is not sustained.

"3. That respondent shall reinstate petitioners to its employ in accordance with Award Nos. 5562 and 5563 of the System Board of Adjustment entered on January 8, 1965, subject, however, to the right of the respondent to limit, discharge or terminate petitioners' employment based upon events occurring or conditions existing after their discharge by the respondent, and the Court reserves jurisdiction to determine whether the events occurring or conditions existing after the discharge of these petitioners affect their right of reinstatement or limit the amount of back pay due them under the System Board's orders, and reserves jurisdiction as to the question of attorneys' fees to be allowed petitioners as provided in Section 153 First (p) of the Railway Labor Act.

"4. Judgment shall be entered accordingly. Exceptions are reserved."

The District Court made a 28 U. S. C. A., § 1292 (b) determination that the order denying NWA a de novo review of the System Board of Adjustment award involves a controlling question of law about which there is a substantial difference of opinion and that an immediate appeal will materially advance the ultimate determination of

this litigation; that a lengthy trial on questions as to matters occurring subsequent to the discharge may be avoided in the event the trial court has erred in its determination of the issues relating to de novo review and the issue as to whether the determination of the System Board was arbitrary or capricious.

This court by order of August 15, 1966, authorized such interlocutory appeal, and the appeal has been timely taken.

NWA in its brief makes no contention that the court committed error in its determination that the award is not arbitrary or capricious. By reply brief, NWA urges such issue is not before us. The notice of appeal is taken from the July 20, 1966, order which includes resolution of this issue. We hold such issue is raised by the appeal and that NWA has failed to demonstrate that the court erred in item two of its order, supra.

The basic issue presented by this appeal is whether the trial court erred in denying NWA a de novo trial—more particularly, a right to present oral testimony on the validity of the System Board of Adjustment award determining Rall and Lee are entitled to reinstatement. The validity of the trial court's decision turns upon the finality to be accorded the Board's determination on the reinstatement issue. For reasons hereinafter set forth, we hold that the trial court correctly determined that the portion of the award adjudicating that Rall and Lee were entitled to reinstatement is final and conclusive and that the court is without power to redetermine such issue.

The rather extensive record facts bearing upon the reasons for the discharge and the basis for the reinstatement have no direct bearing upon the issue here presented and hence the facts will be stated summarily. First Pilot Rall was permanently discharged for a violation of a NWA rule prohibiting a pilot from using intoxicants within

twenty-four hours of the commencement of a flight. Lee was discharged for acting as chief pilot on a flight with Rall knowing the latter had an apparent physical deficiency caused by the use of intoxicants. Rall and Lee exhausted their grievance procedure provided by the contract existing between ALPA, the authorized bargaining agent for the pilots, and NWA.

On January 11, 1952, in conformity to and in compliance with 45 U. S. C. A., § 184, ALPA and NWA entered into an agreement, still in force, creating the Northwest Airlines Pilots' System Board of Adjustment to decide minor disputes arising under the terms of the working agreement between ALPA and NWA. The agreement provides that a decision can be made by a majority of the Board members and that the Board's decision on matters properly referable to it "shall be final and binding upon the parties." It is undisputed that the System Board which heard these cases was constituted in the manner provided by the agreement and authorized by statute and that after an evidentiary hearing, the Board majority by a written final order directed reinstatement of Rall as of November 1, 1964, and Lee as of May 1, 1964.

The controversy submitted to the Board falls in the minor dispute category over which the Board was given jurisdiction.

NWA having failed to comply with the award, the petitioners commenced this action in the District Court for the enforcement thereof on February 10, 1965. The District Court by memorandum opinion and order filed August 6, 1965, denied ALPA's motion for partial summary judgment based upon the same grounds as urged in the motion, the sustaining of which gives rise to the present appeal.

After the decision of the Supreme Court in *Gunther v. San Diego & Arizona Eastern R. Co.*, 382 U. S. 257, de-

cided December 8, 1965, respondent again filed its motion for partial summary judgment, which motion was sustained by the court order herein appealed from.

The trial court, in a very well-considered unreported opinion filed March 7, 1966, with which we fully agree, states:

> "However, it is now perfectly clear, . . . that in *Gunther* the Court summarily has swept aside all former uncertainty as to the intent of Congress in the enactment of Section 153 of the Railway Labor Act and particularly as to Sections 153 First (m) and 153 First (p). . . . *Gunther* has limited the trial de novo to the back pay due the employee under the Board's award and any other issue decided by the Board is to be accepted by the District Court. In other words, the court must accept the findings of the Board and is empowered to enforce them by mandamus or otherwise. The only fact issue for the court to determine is the amount of the money award based on the Board's findings and such additional evidence as may bear upon the amount."

Gunther, an engineer, was discharged for physical disability determined on the basis of a report of the railway's physician. The NRAB, to whom the dispute was submitted after the exhaustion of all remedies at the company level, after a full hearing ordered Gunther reinstated. Gunther applied to the District Court for enforcement. Enforcement was denied. The Court of Appeals affirmed. The Supreme Court reversed, stating inter alia:

> "Section 3 First (m) provides that Adjustment Board awards 'shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award.' The award of the Board in this case, based on the central finding that petitioner was wrongfully removed from service is twofold,

consisting both of an order of reinstatement and the money award for lost earnings. Thus there arises the question of whether the District Court may open up the Board's finding on the merits that the railroad wrongfully removed petitioner from his job merely because one part of the Board's order contained a money award. We hold it cannot. This Court time and again has emphasized and re-emphasized that Congress intended minor grievances of railroad workers to be decided finally by the Railroad Adjustment Board. . . .

"The Railway Labor Act as construed in the foregoing and other opinions of this Court does not allow a federal district court to review an Adjustment Board's determination of the merits of a grievance merely because a part of the Board's award, growing from its determination on the merits, is a money award. The basic grievance here—that is, the complaint that petitioner has been wrongfully removed from active service as an engineer because of health —has been finally, completely, and irrevocably settled by the Adjustment Board's decision. Consequently, the merits of the wrongful removal issue as decided by the Adjustment Board must be accepted by the District Court." 382 U. S. 257, 263-64.

We completely agree with the trial court's view that the *Gunther* opinion as a whole, and the above quoted language in particular, compels a holding in this case that the System Adjustment Board's determination that Rall and Lee are entitled to reinstatement is final, conclusive and binding and must be accepted by the courts.

It is true as argued by NWA that many Courts of Appeal and District Court cases prior to *Gunther* have held otherwise. Such cases were cited and relied upon by the trial court in its memorandum opinion of August 6, 1965.

The validity of such opinions has been struck down by *Gunther*. Post-*Gunther* cases have uniformly construed *Gunther* in the same manner as the trial court here. *Brotherhood of Railroad Trainmen v. Denver & Rio Grande Western R. R.*, 10 Cir., ... F. 2d ... (Dec. 28, 1966); *Hodges v. Atlantic Coast Line R. R.*, 5 Cir., 363 F. 2d 534; *Kemp v. Atchison, Topeka & Santa Fe Ry.*, 5 Cir., 358 F. 2d 722.

NWA summarized its position by stating that if *Gunther* is interpreted as foreclosing a de novo hearing on the reinstatement issue, it reaches a result:

(1) Not sought by either party in *Gunther;*

(2) Contrary to the opinions of the author of the *Gunther* opinion, expressed in earlier dissents;

(3) Contrary to every case decided by every court considering the issue prior to *Gunther;*

(4) Contrary to the provisions of the United States Constitution;

(5) Irrelevant to the issues considered by the cases cited in the *Gunther* opinion;

(6) Obliterating the distinction created by Congress between 45 U. S. C., § 153 and §§ 157-159; and between § 184 and § 185;

(7) Ignoring the plain language of § 153 First (p); and

(8) Not reached by Congress until more than six months after the *Gunther* decision.

Many of such contentions have already been answered. It is conceded that *Gunther* is the first Supreme Court case squarely adjudicating the issue before us. When the Supreme Court has spoken clearly upon the most recent occasion on which the pertinent issue has been considered,

lower courts are bound to follow the pronouncements of law made.

In *Gunther,* the award was made by the National Railroad Adjustment Board created by 45 U. S. C. A., § 153. In our present case, the award was made by a System Adjustment Board created by contract pursuant to statutory authority found in 45 U. S. C. A., § 184. Under the latter section airline employees and labor representatives are authorized and directed to establish by contract System Boards of Adjustment having jurisdiction not exceeding that of § 153 boards. It is conceded that jurisdiction equal to that of § 153 boards may be established.

As heretofore pointed out, the contract creating the System Board is broad and provides for the finality of Board rulings. NWA argues that prior to *Gunther* de novo reviews existed under the circumstances here present and that the parties by their contract could give the Board no greater power than existed by law in a § 153 Board. We believe such argument is based on a false premise. *Gunther* interprets the statutory law as it has at all times here material existed and does not purport to change any previous authoritative Supreme Court decision interpreting the statutory provisions with respect to the scope of review of a board's nonmonetary award.

International Ass'n of Machinists v. Central Airlines, Inc., 372 U. S. 682, holds that contracts and the adjustment boards for which they provide are creations of federal law and bound to the statute (§ 184) and its policy and are governed by federal law, and "that the federal law would look with favor upon contractual provisions affording *some* degree of finality to system board awards." 372 U. S. 682, 694. See *International Ass'n of Machinists v. Northwest Airlines, Inc.,* 8 Cir., 304 F. 2d 206, 211.

Title 45, U. S. C. A., § 153 was amended subsequent to *Gunther* by Public Law 89-456, 80 Stat. 208, effective June 20, 1966. The second sentence of § 153 First (m) reading "A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award." was amended by striking therefrom the words "except insofar as they shall contain a money award." The second sentence of § 153 First (p) was amended by striking therefrom the words "shall be prima facie evidence of the facts therein stated" and inserting in lieu thereof, "shall be conclusive on the parties." A new paragraph (q) was added giving either the carrier or the employees a right to petition to the district court for review. It again provides that the Board's order shall be conclusive and goes on to say that it may be set aside if beyond the Board's jurisdiction or for fraud or corruption.

NWA urges that Congress in making the foregoing amendments reflects its belief that the act before amendment provided for de novo review. Such argument is not persuasive. The principal accomplishment of the amendment is to attach finality also to the money award, an issue on which *Gunther* held courts had power to consider new evidence. See *Brotherhood of Railroad Trainmen v. Denver & Rio Grande Western R. R.*, supra.[1]

The issue of the court's jurisdiction was not raised in the trial court. By reply brief, NWA urges that § 153

[1] It is interesting to note that the Tenth Circuit in Brotherhood of Railroad Trainmen determined that the 1966 amendments, which became effective while the appeal was pending before them, were controlling upon the basis that the repeal of the law conferring jurisdiction, absent a saving clause for pending cases, destroys jurisdiction in the pending case. Such issue was not raised in the case before us either in the trial court or upon appeal. Hence under the rules of judicial administration, we express no view upon such issue here.

First (p) contains the exclusive provision for jurisdiction and that it likewise contains the provision that the Board's award "shall be prima facie evidence of facts therein stated." The first sentence of such section is broad, reading:

> "If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises."

The quoted section appears to be broad enough to confer jurisdiction. We do not believe that the asserted inconsistency between sub-sections (p) and (m) goes to the extent of destroying jurisdiction. It is a familiar rule of statutory construction that statutes must be read together and that the legislative intent must be given effect if possible. See 82 C. J. S., Statutes, §§ 345, 366, and cases there cited.

Gunther expressly holds that the § 153 First (m) provision of finality controls as to nonmonetary awards. The jurisdictional issue is not discussed in *Gunther*. Federal courts are bound to satisfy themselves with respect to jurisdiction, whether the issue is raised or not. *Gunther* obviously is decided upon the basis that jurisdiction exists as to the money award.

It is quite true, as urged by NWA, that the Seventh Amendment guarantees trial by jury in suits of common law. However, it is equally well-settled that a right to a jury trial may be waived. Here the parties by their con-

tract providing for final determination of minor disputes by a Systems Board authorized by § 184 waived any constitutional right they might have had to a jury trial. Moreover, actions to enforce awards under arbitration agreements or statutes were not known to the common law. Courts in furtherance of the express policy favoring compulsory arbitration in labor disputes have customarily limited the scope of review of arbitration awards. *Gunther v. San Diego & Arizona Eastern Ry.*, supra; *United Steel Workers v. Enterprise Wheel & Car Corp.*, 363 U. S. 593, 596; *Brotherhood of Railroad Trainmen v. Denver & Rio Grande R. R.*, supra. A contrary ruling on the jury trial issue would upset a long line of cases limiting review of arbitration awards.

We have given careful consideration to all the contentions vigorously urged by able counsel. We hold that the trial court correctly determined that the award made was not arbitrary or capricious and that NWA is not entitled to a de novo review of the portion of the award requiring reinstatement of Rall and Lee.

Affirmed.

A true copy.

Attest:
Clerk, U. S. Court of Appeals, Eighth Circuit.

[March 30, 1967 Court of Appeals Denial of Rehearing.]

United States Court of Appeals
for the Eighth Circuit.

No. 18523.

Northwest Airlines, Inc., Appellant, vs. Air Line Pilots Association, International, David G. Rall and R. E. Lee.	Appeal from the United States District Court for the District of Minnesota.

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

March 30, 1967.

[October 9, 1967 Supreme Court Denial of Certiorari (389 U. S. 827, 88 S. Ct. 77, 19 L. Ed. 2d 83).]

Supreme Court of the United States.

October Term, 1967.

No. 304.

Northwest Airlines, Inc.,
Petitioner,

v.

Air Line Pilots Association, International, et al.,
Respondents.

October 9, 1967. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Henry Halladay for petitioner.

Edward M. Glennon and Allen E. Gramza for respondents.

Reported below: 373 F. 2d 136.

[August 1, 1968 District Court Order.]

United States District Court,
District of Minnesota,
Fourth Division.

4-65 Civil 40.

Air Line Pilots Association, International, David G. Rall and R. E. Lee,

Petitioners,

vs.

Northwest Airlines, Inc.,

Respondent.

ORDER.

Mr. Edward M. Glennon and Mr. Kenneth Kirwin, of Messrs. Lindquist and Vennum, Minneapolis, Minnesota, for petitioners;

Mr. Henry Halladay and Mr. John M. Mason, of Messrs. Dorsey, Marquart, Windhorst, West and Halladay, Minneapolis, Minnesota, for respondent.

This proceeding came on for trial before the Court without a jury on June 10, 1968. The testimony was concluded on June 26, 1968. The several prior orders of this Court are dated August 6, 1965, March 7, 1966, and July 20, 1966; the latter order granted petitioners a partial summary judgment and allowed an interlocutory appeal herein. The decision of the Court of Appeals of February 23, 1967, affirmed this Court's order of July 20,

1966 (373 F. 2d 136); rehearing denied March 30, 1967; certiorari denied October 9, 1967 (389 U. S. 827). The partial summary judgment order of July 20, 1966, granted to the petitioners provided, in part,

> "3. That respondent shall reinstate petitioners to its employ in accordance with Award Nos. 5562 and 5563 of the System Board of Adjustment entered on January 8, 1965, subject, however, to the right of the respondent to limit, discharge or terminate petitioners' employment based upon events occurring or conditions existing after their discharge by the respondent, and the Court reserves jurisdiction to determine whether the events occurring or conditions existing after the discharge of these petitioners affect their right of reinstatement or limit the amount of back pay due them under the System Board's orders, and reserves jurisdiction as to the question of attorneys' fees to be allowed petitioners as provided in Section 153 First (p) of the Railway Labor Act."

Basically, therefore, the question presented at this trial is the amount of pay lost by Rall since November 1, 1964, and with respect to Lee since May 1, 1964, the respective dates of their reinstatement by the System Board, and whether any amount of back pay should be allowed to them by reason of the failure of the respondent to comply with the reinstatement order of that Board. Obviously, if events occurring or conditions existing after the dates set by the Board for their reinstatement affect their rights in that regard, either at the date set by the Board or at some time subsequent thereto, the amount of back pay to be allowed may be directly affected. A physical or mental deficiency occurring after the dates of reinstatement may well render either one of these petitioners unable to perform the highly skilled duties which a pilot or a co-pilot is required to perform. However, in this proceeding the respondent does not contend that either Rall or Lee had

suffered any physical deficiencies before or since the date of their respective reinstatements as ordered by the Board which would interfere with their ability to perform the duties of a pilot in active service for Northwest Airlines. In fact, the technical proficiency of these two men to fly a modern Northwest airship, after additional training, by reason of some four years' absence from Northwest, is not challenged herein. However, in the words of respondent's counsel,

> "* * * both of the petitioners have been and are suffering from deficiencies more subtle in character, more difficult to detect, more problematical to find, and more difficult to prove, than something as obvious as a heart condition. But nevertheless, it is Northwest's contention that both of the petitioners are suffering from some measure of character deficiency which incapacitates both of them from performing services and from receiving back pay for not performing services, which deficiencies in character are as real as if each and both of them were suffering from some form of a physically crippling ailment.
>
> "We believe that this Court has already said and that the Supreme Court of the United States has ruled that developments over time after a decision of a System Board which produced a physical deficit, such that had the person in question been working on the day of the development of that physical deficit would not have permitted him to work, he is not entitled to pay for the time during which he is suffering from that physical deficit. And we submit to the Court that if there is a mental, intellectual, emotional character deficit that is for these purposes as real and crippling as a lost limb, or something not quite that dramatic, it is proper to take that into consideration in arriving at the reserved question of reinstatement and back pay" (Tr., pp. 15-16, Arguments).

In view of respondent's position herein as noted above, the Court has given due consideration to the facts and circumstances relied upon by it as bearing upon the petitioners' mental, intellectual, or emotional deficiencies.

It appears from the testimony offered by the respective parties that David Rall, after his discharge by the respondent, was employed as a flight inspector for Aero-Flight Co., of Bellevue, Washington, from April 24, 1964, to July 10, 1964, and as a truck driver for Goodwill Enterprises, of Seattle, Washington, from March 10, 1965, to March 10, 1966. His duties for Aero-Flight consisted of giving flight instructions and the performance of other incidental duties in flying airplanes. At all times he held a F. A. A. license as a flight instructor as well as an Airline Transport Pilots license. The events disclosed by the evidence upon which the respondent relies when Rall was employed by Aero-Flight do not require any extended comment. It appears that Rall had a dispute with one Glenn Cook, the latter being one of the instructors employed by Aero-Flight, but subordinate to Rall. Apparently Cook became angry because Rall had allegedly delayed in making an aircraft available to him for instruction purposes and he became insulting and obnoxious to Rall. Thereafter, some blows were exchanged between the two men. However, the record will not justify a finding that Rall did anything during this episode which constitutes any barrier to his return as a Northwest Airlines pilot. The manner and the extent of his resentment to Cooke's unprovoked, belligerent and insulting conduct is at least understandable. The average normal man probably would have reacted in the same way. A similar observation may be made as to the dispute which Rall had with a Mr. Detroit, his employer at Aero-Flight. There is an absence of any justification for the magnification of these two episodes as constituting any serious reflection on Rall's emotional stability, his character deficiency, or

otherwise, which relate to his right to be reinstated as a pilot as ordered by the Board.

The only other incident in Rall's subsequent employment relied upon by the respondent as affecting his back pay arises by reason of certain happenings when he was employed as a truck driver for Goodwill Enterprises. He was charged by that employer with failure to report two minor accidents which occurred during his employment. The evidence is contradictory as to the timeliness of Rall's report of these two incidents. In any event, instead of reflecting emotional and character instability, Rall's willingness to accept employment with Goodwill as a truck driver and his entire record with that concern more strongly supports him as a man of character who was willing to accept work as a truck driver and one who satisfactorily performed that work regardless of the fact that it was a decided step down from the status of a captain on a Northwest Airliner. The Court is clear, therefore, that the record herein requires a finding that, as to petitioner Rall, he is entitled to the full back pay allowance from the respondent, subject to certain deductions by way of earnings, as will be hereinafter mentioned.

The evidence with respect to Lee requires a more extended consideration of the record in that the alleged lack of character, integrity and emotional stability arises from his employment as a pilot on airlines in the State of Hawaii after his discharge by Northwest. It appears that after his discharge, Lee was employed by the Hawaiian Air Tour Service from some day in May, 1964, to the first part of August, 1964. This organization conducted sightseeing tours in and around Hawaii in small airplanes known as DeHavilland Doves. On these trips, Lee served as pilot and as narrator concerning points of interest. Several stops were made on the various islands which compose the Hawaiian group and the tour would last about

a day. One David R. Huffman was Director of Operations for the Hawaiian Air Tour Service commonly called HATS. Hans Mueller was President of the company.

It is quite apparent that having spent some years in performing his duties as a co-pilot on Northwest Airlines, Lee adopted a technique in flying the smaller DeHavilland planes used by HATS which was considered by some of his associates, particularly certain second officers or stewards on the planes which he flew, as being unusual; that is, they contended that on take-offs he would utilize too much speed at times and also in making his landings. Apparently Mr. Huffman heard of these complaints about Mr. Lee and made some sort of an investigation which the respondent contends formed the basis of a reprimand subsequently filed against Lee. This reprimand was dated July 25, 1964 (Huffman Deposition Exhibit 1-I), copy of which is attached hereto. (The comment "False & Twisted" in handwriting was written thereon by Lee after the reprimand was filed).

It is significant that during the evening of July 25, 1964, the date of the reprimand, Huffman paid a visit to Lee at his residence in Honolulu, and there was a long discussion between these two men regarding some of the matters commented upon in the reprimand. There was no indication at that time that Huffman intended to file a reprimand against Lee. Quite the contrary is to be deduced from a tape recording taken by Lee of all of the conversation between the two men during the two hour plus meeting at Lee's home. It appears that Huffman was not aware of the tape recording until after the end of the meeting, and it is quite evident from the evidence that Lee's action in installing a tape recorder in the premises without Huffman's knowledge irked the latter and the personality clash between these two men which had existed for some time ripened into a feeling of some

bitterness and suspicion. It seems entirely fair to find that the reprimand was written by Huffman after the conference at Lee's home and probably induced by the fact that Lee had made a tape recording of their conference. After the reprimand had been filed, Lee protested that Huffman had filed a reprimand without affording him a hearing, and he contended that the statements contained in the document were untrue. There was support for some of the charges made by Huffman, particularly with reference to the excessive power on take-offs and landings. On July 29, 1964, Lee addressed a letter to T. H. Cooke, Chief Pilot for HATS (Huffman Deposition Exhibit 1-J), copy of which is attached hereto. He also sent a letter to Mr. Mueller regarding the reprimand and his report as to the August 1, 1964, landings (Huffman Deposition Exhibit 1-H), copy of which is attached hereto.

There occurred two forced landings by Lee on August 1, 1964, when he was operating a DeHavilland Dove for HATS on one of these scheduled tours about the islands. On that date Lee made an unscheduled landing with passengers aboard at South Cape, Hawaii, a not too desirable landing spot, but which he selected when he learned that the left engine had quit running. He concluded that the fuel quantity gauges were erroneous and that his decision to land at South Cape was prudent and advisable. A mechanic, one C. R. Launchbury, Director of Maintenance for HATS, was called to inspect the aircraft at South Cape, and after inspection it was his report that Lee had erroneously left the left fuel boost pump in an "on" position and that that caused the fuel in the left tank to be transferred to the right tank in flight. This Lee denied. A copy of Launchbury's report to Mr. Mueller (Huffman Deposition Exhibits 1-F and 1-G), dated August 4, 1964, is attached hereto. After repairs had been made by Launchbury, Lee was required to make another unscheduled landing when operating the same plane during the

same tour at Kahului Airport on the island of Maui by reason of roughness in the right engine which gave him a fire warning. Under date of August 3, 1964, he made a report to David R. Huffman of the two so-called forced landings (Huffman Deposition Exhibit 1-K), copy of which is attached hereto.

Huffman complained to Lee that the report regarding the two unscheduled landings was not sufficient to satisfy him and demanded a further report. Lee contended that his report was sufficient and refused to file another report, and this led to his discharge early in August, 1964. On August 7, 1964, the Chief Pilot for HATS, Thomas Cooke, made a report addressed to Hawaiian Air Tour Service and to the Director of Operations (Huffman Deposition Exhibit 1-L), copy of which is attached hereto.

In connection with the incident of August 1st, it may be noted that Lee made a more extended report of the two unscheduled landings to one H. S. Troxell of the Federal Aviation Administration at Honolulu (Petitioners' Exhibit 27) dated August 4, 1964, copy of which is attached hereto.

With reference to the report of Thomas H. Cooke, the Chief Pilot, it may be noted that when his deposition was taken at Honolulu on May 28, 1968, in answer to a question by counsel for the respondent which was framed as follows in referring to Lee's record with HATS,

> "Q. At the time of the termination, had you arrived at any conclusion as to Mr. Lee's capacity to remain as a pilot for HATS?"

he answered "Yes." And in response to the question as to what was his conclusion as to Lee's capacity, Mr. Cooke answered that "he was a skillful and competent pilot." In addition at that time he was asked this question:

"Q. At that time had you arrived at any judgment as to his character as a pilot?"

To this question he answered "Yes," and in response to the question "What was that?", his answer was "Well, he had fulfilled our requirements."

It is difficult on this record to make a definitive finding as to the exact cause for the left fuel tank to run dry on the DeHavilland Dove which precipitated the unscheduled landing at South Cape, sometimes called South Point. Lee may have left the left fuel boost pump in an "on" position through inadvertence, as Launchbury, who is now deceased, contended, but see Cooke's letter of August 7, 1964 (Huffman Deposition Exhibit 1-L), copy of which is attached hereto. And there is evidence that there was under-maintenance and under-repair by HATS as to the planes that it had in service. Moreover, as to the second unscheduled landing on August 1, 1964, there is an absence of any evidence which would indicate that Lee was responsible in any way for the condition of the engine that forced that landing. It may well be that the transition by Lee from the status of a co-pilot of one of the large well-maintained planes of Northwest to a pilot and narrator on a small plane used on tours in and around Hawaiian islands created in him a resentment toward those who assumed to criticize his efficiency and safety methods. He did not always accept criticism in the proper manner, and it would appear that while working for HATS he was of the opinion that, with respect to complaints against any unorthodox methods he may have employed in taking off and in landing small planes, there would be a formal hearing as to these charges, with his accusers present to express their views, so that he might be afforded an opportunity to defend himself in the similar manner that would have been employed if he had been criticized when functioning as a co-pilot for Northwest.

Concededly, while employed by HATS, there was at times a personal antagonism between him and Huffman. Lack of cooperation between the two seems evident when the more detailed and complete report that Lee made to Troxell under date of August 4, 1964, is considered. His refusal, however, to amplify or change in any way the report he had made to Huffman on August 3, 1964, does not seem warranted. The letter of August 4, 1964 (Huffman Deposition Exhibit 1-C), copy of which is attached hereto, concerning Lee's smoking while flying has been duly considered, but it is not of any great consequence as to the issues herein.

There is evidence in the record that Lee did not, when employed by HATS, note in the flight records who the steward was, or other data, but there is a lack of any evidence that this constituted any material deviation from his duties as a pilot. There also is testimony that on one of the sight-seeing tours he lost power in the left engine while over the sea, and as a precautionary measure he required the passengers to put on their life jackets. But this incident in no way reflects on his ability as a pilot, nor does it reflect any lack of stability as a pilot. He was not responsible for the engine's losing power. Apparently his order with reference to the life jackets for his passengers was a precautionary safety measure under the circumstances and the evidence fully justifies a finding with reference thereto that as a pilot he exercised good judgment.

After Lee left HATS, he obtained employment with Ringo, an air taxi concern flying passengers between points on the Hawaiian Islands. His employment lasted some thirty days and ended in September, 1964. The reason for his discharge stemmed from Lee's affording a feminine hotel employee a short ride on one of the Ringo airplanes during a lay-over at one of the scheduled stops.

It would appear that Lee assumed that he was promoting business for Ringo by this goodwill gesture. At best, it is an incident that is too trivial to create any charge of misconduct or reflection upon his ability as a pilot. For some reason his employer, however, took offense at his conduct in this regard and he was discharged. After that time he made his living the best way he could by selling cemetery lots, real estate and sewing machines, and engaged in other activities which in no way throw any light upon the issues in this proceeding.

As heretofore stated, the evidence as to Rall falls far short of serving as any foundation for an order denying him reinstatement with Northwest as ordered by the System Board, and under the evidence he was entitled to be employed by Northwest from the date of his reinstatement by the Board until he reached his sixtieth birthday on April 24, 1967, which was his retirement date, and as of that date his pension rights would accrue.

The comments the Court has made as to Lee will reflect that, although there is some basis for criticism of Lee's flying technique in handling some of the DeHavilland planes while employed by HATS, and his somewhat unyielding attitude while employed by that company, due allowance should be made for the impact of the adverse personality characteristics of Mr. Huffman. All of the events upon which the respondent now relies as the bases for denying Mr. Lee any back pay took place from May to September, 1964, before the hearings before the Board on October 20 to October 23, 1964. His employment with Northwest began on or about July 17, 1948, and continued until his discharge on February 28, 1964, effective February 9, 1964, at which time he was a senior co-pilot. There is no contention that, during his long employment with Northwest, Lee demonstrated any of the so-called character and emotional deficiencies upon which respondent

now relies. Respondent does not contend that Lee was not reinstated in accordance with the order of the Board because it had learned of any events which demonstrated the alleged adverse qualities which it now stresses. Respondent's position always has been that the Board's action of reinstatement should not be sustained, and relied upon the strength of its legal position that it was entitled to a trial de novo as to Lee's misconduct of January 1, 1964. It therefore refused to reinstate Lee as a co-pilot as ordered by the Board.

The incidents developed in the evidence as to Lee's career flying small aircraft on island tours in Hawaii for a period of a few months in 1964 after his discharge by Northwest, although checkered with some difficulties, should not be permitted to dominate and completely erase the record he attained as to his emotional stability and character sufficiency when employed by Northwest Airlines for some sixteen years prior to January 1, 1964. He never has been offered an opportunity by respondent after the order of reinstatement by the System Board to demonstrate that his emotional character and integrity qualifications are ample to support the safe and satisfactory performance of his duties as a co-pilot and as a captain of Northwest aircraft. Moreover, for a period of nearly four years from the first part of September, 1964, to the present, there is an absence of any testimony that has any adverse bearing whatsoever on Lee's alleged mental, intellectual or emotional character deficits.

In passing, it may be noted that the Court weighed the credibility of each of these petitioners and observed their demeanor and attitude when they were on the witness stand. It is true that at times Lee was slow in quickly comprehending the full import of the question propounded to him and his answers at times seemed unnecessarily long and extended. However, any idiosyncracies in this

regard may be attributed to nervousness on the witness stand after a long and trying wait for his day in court. In any event, the Court cannot find that Lee's conduct on the witness stand lends any weight to the respondent's contention as to his emotional and character instability. Rall, generally speaking, was a straight-forward and convincing witness.

After giving careful consideration to this entire record, the Court is of the view that the respondent has failed to sustain the burden of proof which rests upon it, and upon the evidence it is the Court's view that Lee should have been reinstated as a co-pilot by Northwest at the time of the Board's order and could have served efficiently and capably thereafter in that capacity and in his advance in seniority to the capacity of captain during the period with which we are concerned. Both Rall and Lee have retained their status with the F. A. A. and hold the necessary certificates from that organization as airplane pilots, together with approved medical examinations which are current. In that Rall has reached the retirement age, we are not concerned with his reinstatement as a pilot after April 24, 1967. But as to Lee, the Court finds that he now should be returned to his duties with Northwest as a pilot after passing the necessary training tests to enable him to fly the present aircraft which Northwest operates and which obviously present a type of operation which was not in vogue at the time of his discharge. The amount of back pay to be allowed this petitioner will be discussed hereafter.

It may be noted that the Court did not admit an offer of proof made by the respondent as to the incidents of January 1, 1964, which led to the dismissal of these two petitioners by respondent and which action was modified by the System Board as heretofore indicated. In that regard, it is the Court's view that the discipline having

been adjudged as to each of these men by the Board, this Court should not take testimony again as to the events which form the basis for the System Board's action. Certainly, the Board having determined the discipline which should be imposed for the infraction of the company's rules on January 1, 1964, which decision is final, the amount of any money award to be allowed to them should not be diminished by the incidents of that day. There is no testimony whatsoever that either of these two men have had any drinking problem since January 1, 1964, or that they have violated in any way any rule of their subsequent employers in drinking intoxicating liquors, and moreover, there is no relationship between the infraction of the rules on January 1, 1964, and the events thereafter in their employment when they were not employed by respondent. However, the Court in prior hearings has heard and considered the testimony before the System Board with regard to the January 1, 1964, violations, and if it be urged that that testimony should be considered in weighing the alleged magnitude and gravity of the present charges of moral and character insufficiency, the Court finds that after giving full and complete consideration to the testimony of the January 1, 1964, incident in connection with the present record, these two petitioners are entitled to the relief which they seek herein.

It may be noted that in the System Board's order it was provided that the discipline accorded to each of these petitioners should not "in any way affect his seniority, accruals, assignments, and all other employees' privileges." Respondent does not challenge the components entering into the computation of back pay of these petitioners as reflected in Petitioners' Exhibits 11 to 11-S, inclusive. And the Court, therefore, accepts said exhibits as correctly setting forth the various components which should be considered as to the amount of back pay, etc. It appears that each of these petitioners had been paid

certain monthly benefits by A. L. P. A., the Air Line Pilots Association, from July, 1965, to May, 1968, and each stated in open court that the money thus received should and would be returned to that organization from any recovery made herein. Obviously, the respondent would not be entitled to any credit for such payments on the back pay to be allowed herein.

The Court adopts the foregoing as its Findings of Fact, and as Conclusions of Law thereon, that judgment may be entered in behalf of each of these petitioners as to back pay substantially as reflected in Petitioners' Exhibits 11 to 11-S, inclusive, less deductible earnings during the period in question, together with reasonable attorneys' fees to be determined later by the Court. A form of judgment may be presented to this Court by the petitioners' counsel with the amount of the back pay recovery and the attorneys' fees to be allowed left in blank. This form of judgment may be presented upon seven days' notice to respondent's counsel. An exception is allowed.

Dated this 1st day of August, 1968.

By the Court:

Gunnar H. Nordbye,
Judge.

[October 11, 1968 District Court Order]

United States District Court,
District of Minnesota,
Fourth Division.

Air Line Pilots Association, International, David G. Rall and R. E. Lee, Petitioners, vs. Northwest Airlines, Inc., Respondent.	4-65 Civil 40.

ORDER FOR JUDGMENT.

This action came on to be tried before this Court without a jury on June 10, 1968, and was concluded on June 26, 1968. The Court having heard the evidence adduced by the parties, made its Findings of Fact and Conclusions of Law on August 1, 1968, and thereafter heard further arguments of counsel at hearings on August 21, September 19 and September 24, 1968, and having been fully advised in the premises,

It Is Hereby Ordered and Adjudged:

1. That in accordance with the award of the Northwest Airlines' Pilot System Board of Adjustment of January 8, 1965, copy of which is attached to the complaint herein as Exhibit C, respondent Northwest Airlines, Inc., shall not permit the discharge of petitioner David G. Rall to affect in any way his pension, seniority, accruals, assignments, or any other employee privileges;

2. That said petitioner David G. Rall recover of said respondent, Northwest Airlines, Inc., the sum of One Hun-

dred Three Thousand, Eight Hundred Thirty-nine Dollars and Ninety-eight Cents ($103,839.98) as back pay as of August 21, 1968, together with interest on said sum at the rate of six per cent per annum from August 21, 1968, until said sum is paid, together with attorneys' fees and his costs of this action, as provided herein;

3. That the Court retains jurisdiction herein to consider, upon proper application, any claim which might arise after the entry of judgment herein, in the event of any difficulty or any inability on the part of said petitioner David G. Rall to enforce his rights with respect to the Northwest Airlines, Inc.'s pilots pension plan;

4. That in accordance with the award of the Northwest Airlines' Pilots System Board of Adjustment of January 8, 1965, copy of which is attached to the complaint herein as Exhibit D, respondent Northwest Airlines, Inc., shall reinstate petitioner R. E. Lee in his employ as a pilot with said respondent;

5. That said reinstatement shall obtain during the pendency of any appeal in these proceedings;

6. That said respondent shall not permit its discharge of said petitioner to affect in any way his pension, seniority, accruals, assignments, or any other employee privileges;

7. That said petitioner R. E. Lee shall have judgment against said respondent, Northwest Airlines, Inc., in the sum of One Hundred Twenty-eight Thousand, Eight Hundred Twenty-one Dollars and Sixty-eight Cents ($128,821.68) as back pay as of August 21, 1968, with interest on said sum at the rate of six per cent per annum from said date until said sum is paid, together with attorneys' fees, and with his costs of this action, as provided herein;

8. That the Court retains jurisdiction herein as follows: (a) to consider, upon proper application, any claim which

might arise after entry of judgment herein with regard to back pay due petitioner R. E. Lee after August 21, 1968, and (b) in the event of any difficulty or any inability on the part of said petitioner R. E. Lee to enforce his rights with respect to the Northwest Airlines, Inc.'s pilots pension plan;

9. That said petitioners David G. Rall and R. E. Lee recover from said respondent, Northwest Airlines, Inc., their costs of this action, plus the following amounts for reasonable attorneys' fees as of September 1, 1968, which sums may be taxed and included jointly as part of the costs in the above-entitled proceedings:

(a) The sum of Sixty-seven Thousand Dollars ($67,000.00) for the services rendered and costs incurred by the firm of Lindquist and Vennum (and its predecessor, Lindquist, Magnuson and Glennon); attorneys for the petitioners;

(b) The sum of Four Thousand Five Hundred Dollars ($4,500.00) for the services rendered and costs incurred by John L. Vogel, one of the attorneys for petitioners;

(c) The allowances of attorneys' fees are to bear interest at the rate of six per cent per annum from September 1, 1968, until paid;

(d) The Court reserves jurisdiction herein to consider, upon due application, the allowance of further attorneys' fees and costs incurred after September 1, 1968, by petitioners in connection with these proceedings.

Let judgment be entered accordingly.

Dated this 11th day of October, 1968.

By the Court:

GUNNAR H. NORDBYE,
Judge.

United States District Court,
District of Minnesota,
Fourth Division.

Air Line Pilots Association, International, David G. Rall and R. E. Lee,
Petitioners,
vs.
Northwest Airlines, Inc.,
Respondent.
4-65 Civil 40.

MEMORANDUM.

Needless to say, the determination of the amount of back pay allowed to these petitioners is not free from difficulty. Respondent's objections to the components of back pay as reflected in Petitioners' Exhibits 11 to 11 (s), inclusive, have been duly considered. However, when these exhibits were offered in evidence, the record reflects that, in the main, the components and computations therefrom were received without objection. True, the foundations in part were based upon opinions, but the opinions were given by witnesses with sufficient background and experience to justify the receipt in evidence of the opinions expressed. In any event, the respondent has failed to offer any evidence whatsoever which weakens the verity of the opinions and conclusions which may be reflected in said exhibits and the testimony of other witnesses, including Rall and Lee, with respect thereto. The Court in its order of August 1, 1968, stated, in referring to Petitioners' Exhibits 11 to 11 (s), inclusive, that "it accepted said exhibits as correctly setting forth the various components which should be considered as to the amount of back pay, etc.," and respondent has not produced thereafter any excerpts from

the testimony herein which cause the Court to change its views in this regard. However, due deductions have been made herein in the computation of back pay allowances for the exclusion of the pension fund claims in the Exhibit 11 series.

Petitioners' counsel proved their attorneys' fees by the testimony of Mr. Glennon on behalf of Lindquist and Vennum, supplemented by the affidavit of Mr. Lindquist. Mr. Vogel was sworn and testified in his own behalf regarding the services he had performed. Any percentage agreement, however, that Mr. Vogel may have had with petitioner Rall or Lee as to attorneys' fees was not considered by this Court as constituting any evidence as to the reasonable value of his services herein. Any legal services which are compensatory as costs herein to Mr. Rall and Mr. Lee must be limited primarily to the time that Mr. Vogel spent and expenses incurred at the trial of this action and in the taking of depositions. The bulk of the conferences which Mr. Vogel may have made with Mr. Rall in Seattle have not been shown to have been directed or conducive to the recovery herein of that petitioner. These services may be compensatory by reason of the relationship of attorney and client as between Mr. Vogel and Mr. Rall, but their contribution to the end result of this litigation necessarily is markedly limited. However, the distance between Mr. Rall and his local lawyers would seem to justify a retention of Seattle counsel, at least for limited purposes.

In the allowance of attorneys' fees and costs to petitioners' attorneys, the Court has had the benefit of Petitioners' Exhibits 35 and 36, which contain the time sheets of Lindquist and Vennum and their predecessors. Some items of costs, such as airplane fares for petitioners and their wives to Minneapolis have been disallowed, together with deductions for certain errors as reflected in Mr. Lindquist's supplemental affidavit of August 29, 1968.

However, if the Court is correct as to the application of Section 153 First (p), Title 45, U. S. C. A., to these proceedings, the interpretation to be given to the phrase "a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit" must necessarily include the reasonable expenses that petitioners' attorneys incurred in the performance of such services.

The respondent produced no evidence to contradict the verity of the attorneys' fees claimed herein, and if it desired personal examination of each of the attorneys in the Lindquist and Vennum firm as to the relationship between the record of the time sheets and the proceedings in question, no request was made therefor. And the Court at no time foreclosed the respondent that right. Admittedly, the legal services rendered by Lindquist and Vennum and their predecessors from February, 1965, to September 1, 1968, were devoted to involved and intricate questions of law and fact which required the highest legal skill.

Petitioners have objected to the deductions of interim earnings obtained by each of the petitioners since they were discharged, but in making its computations as to recovery for back pay, the Court has credited the back pay allowances with the interim earnings of each petitioner.

This memorandum is hereby made a part of the order granting petitioners back pay and attorneys' fees and costs of even date in this proceeding. Exceptions are reserved with respect thereto.

Dated this 11th day of October, 1968.

By the Court:

Gunnar H. Nordbye,
Judge.

APPENDIX B.

(STATUTES INVOLVED.)

28 U. S. C., § 1331.

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

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28 U. S. C., § 1337.

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

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45 U. S. C., § 151a.

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for

the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

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45 U. S. C., § 153 First (p).

First. There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

* * * * * * *

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's

fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

45 U. S. C., § 153 Second.

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such repre-

sentative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree

upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

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45 U. S. C., § 181.

All of the provisions of sections 151, 152, and 154-163 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

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45 U. S. C., § 182.

The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of sections 151, 152 and 154-163 of this title shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee", respectively, in section 151 of this title.

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45 U. S. C., § 184.

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of sections 181-188 of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air

and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in sections 151-163 and 181-188 of this title shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of sections 181-188 of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

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45 U. S. C., § 185.

When, in the judgment of the National Mediation Board, it shall be necessary to have a permanent national board of adjustment in order to provide for the prompt and orderly settlement of disputes between said carriers by air, or any of them, and its or their employees, growing out of grievances or out of the intrepretation or application of agreements between said carriers by air or any of them, and any class or classes of its or their employees, covering rates of pay, rules, or working conditions, the National Mediation Board is empowered and directed, by its order duly made, published, and served, to direct the said carriers by air and such labor organizations of their employees, national in scope, as have been or may be recognized in accordance with the provisions of sections 151-163 and 181-188 of this title, to select and designate four representatives who shall constitute a board which shall be known as the "National Air Transport Adjustment Board." Two members of said National Air Transport Adjustment Board shall be selected by said carriers by air and two members by the said labor organizations of the employees, within thirty days after the date of the order of the National Mediation Board, in the manner and by the procedure prescribed by section 153 of this title for the selection and designa-

tion of members of the National Railroad Adjustment Board. The National Air Transport Adjustment Board shall meet within forty days after the date of the order of the National Mediation Board directing the selection and designation of its members and shall organize and adopt rules for conducting its proceedings, in the manner prescribed in section 153 of this title. Vacancies in membership or office shall be filled, members shall be appointed in case of failure of the carriers or of labor organizations of the employees to select and designate representatives, members of the National Air Transport Adjustment Board shall be compensated, hearings shall be held, findings and awards made, stated, served, and enforced, and the number and compensation of any necessary assistants shall be determined and the compensation of such employees shall be paid, all in the same manner and to the same extent as provided with reference to the National Railroad Adjustment Board by section 153 of this title. The powers and duties prescribed and established by the provisions of section 153 of this title with reference to the National Railroad Adjustment Board and the several divisions thereof are conferred upon and shall be exercised and performed in like manner and to the same extent by the said National Air Transport Adjustment Board, not exceeding, however, the jurisdiction conferred upon said National Air Transport Adjustment Board by the provisions of sections 181-188 of this title. From and after the organization of the National Air Transport Adjustment Board, if any system, group, or regional board of adjustment established by any carrier or carriers by air and any class or classes of its or their employees is not satisfactory to either party thereto, the said party, upon ninety days' notice to the other party, may elect to come under the jurisdiction of the National Air Transport Adjustment Board.